Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY and DEE THOMASON FORD,

Petitioners,

vs.

DENNIS MILHOLLIN AND MICHELLE MILHOLLIN,

Respondents.

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

DONNA M. EATON,

Respondent.

(Caption continued on inside cover)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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FORD MOTOR CREDIT COMPANY and MARV TONKIN FORD SALES, INC.,

Petitioners,

vs.

DARRELL MESSINGER,

Respondent.

FORD MOTOR CREDIT COMPANY and WEBSTER WOLFARD FORD, INC.,

Petitioners,

vs.

DAVID P. ANDRESEN,

Respondent.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Ford Motor Credit Company (hereinafter "Ford Credit"), Dee Thomason Ford, Marv Tonkin Ford Sales, Inc. and Webster-Wolfard Ford, Inc., respectfully pray that a writ of certiorari issue to review

the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 28, 1978.

Opinions Below.

The opinion of the Court of Appeals (App. A at 1a-12a) is reported at 588 F.2d 753. The opinions, orders, and judgments of the District Court (App. B at 13a-39a) are not reported.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 28, 1978. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the existence of a right to accelerate an indebtedness upon default must be disclosed as a default, delinquency or similar charge pursuant to Section 128(a)(9) of the Truth in Lending Act and Section 226.8(b)(4) of Regulation Z promulgated by the Federal Reserve Board.

2. Whether the exercise of a right to accelerate an indebtedness upon default constitutes a "prepayment" under Section 226.8(b)(7) of Regulation Z.

3. Whether the creditor's rebate agreement applicable to payment of an indebtedness after acceleration must be separately disclosed under Section 226.8(b)(7) of Regulation Z where the creditor's rebate disclosure applicable to prepayment applies to payment both before and after acceleration.

Statutory Provisions and Regulations Involved.

Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9):

> "(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> . . .
>
> (9) The default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(4):

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . .
>
> (4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(7):

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . .
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract

does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

Statement of the Case.

This proceeding involves four separate actions brought by respondents in the United States District Court for the District of Oregon for damages under the Federal Truth in Lending Act (herein the "Act"). Jurisdiction of the District Court was based on Section 130(e) of the Act [15 U.S.C. § 1640(e)].

In each of these cases, the respondent purchased an automobile from a dealer (one of the petitioners other than Ford Credit) on an installment basis. As a part of the transaction, the respondent signed an installment sale contract in favor of the dealer. In each case, the contract was subsequently assigned by the dealer to Ford Credit.

The installment sale contracts signed by the respondents consisted of single-page printed forms that were prepared specifically for use in connection with installment sales of automobiles subject to the Truth in Lending Act. The terms and conditions of the sale were contained on both sides of the page. Consistent with Section 226.8(a) of Regulation Z, which requires all disclosures to be made on the same side of a single page, the front side of the form also served as the "federal disclosure statement" required under the Act. In three of the cases, the same form of contract was used. The form signed by the respondent in the fourth case differed only in certain minor respects.

Paragraph 14 on the front side of each of the contracts contained the following provision dealing with the purchaser's right to a rebate of unearned finance charges in the event of a prepayment of the obligation:

"(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final installment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00."

Paragraph 19, set forth on the reverse side of each of the contracts, contained an acceleration clause that permitted Ford Credit to declare all unpaid installments to be immediately due and payable in the event of a default by the purchaser. In part, that paragraph provided that:

"19. DEFAULT

Time is of the essence of this contract. In the event Buyer defaults in any payment . . . , or fails to comply with any other provision hereof . . . , Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . ."

Upon full payment of the indebtedness following acceleration, paragraph 14 of the contract, quoted above, requires a rebate of unearned finance charges. In accordance with this provision, Ford Credit's practice is to rebate unearned finance charges upon payment of the indebtedness after acceleration in all cases.[1]

The respondents alleged that the installment sale contracts did not comply with the requirements of the Truth in Lending Act and Regulation Z. Among the

[1] *See, e.g., Eaton v. Ford Motor Credit Co.,* Record at 182. *See also* note 5, *infra.*

violations alleged by the respondents was that the acceleration clause was not disclosed on the face of the contracts. Relying upon its earlier opinion in *Woods v. Beneficial Finance Co.,* 395 F. Supp. 9 (D. Or. 1975), the District Court ruled in favor of the respondents, holding that the Act imposes a "duty to disclose and fully explain any right of acceleration." (App. B at 17a)[3].

On appeal to the United States Court of Appeals for the Ninth Circuit, the four cases were consolidated. Solely upon the basis of its earlier decision in *St. Germain v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977) (App. C at 40a-51a), the Ninth Circuit upheld the District Court's conclusion that the acceleration clause must be disclosed. The decision in *St. Germain,* which conflicts with the position of the Federal Reserve Board and decisions by five other Circuit Courts, was premised upon the Court's novel and unprecedented determination that the act of accelerating and indebtedness constitutes a "prepayment" that must be disclosed under Section 226.8(b)(7) of Regulation Z. The Ninth Circuit's decision in these cases is in direct and clear conflict with the decisions of five other Circuits—the Third, Fifth, Eighth, Tenth and District of Columbia—on issues identical to the issues in this case. While there are substantial differences in the rationales employed by the other Circuits, the Ninth Circuit stands alone in the result achieved under the facts in this case. In reaching its result, the Ninth Circuit has failed

[3]The District Court ruled in favor of the respondents on the acceleration issue in the *Milhollin* and *Eaton* cases. In *Messinger* and *Andresen,* the District Court found other violations and did not reach the acceleration issue. See *Milhollin v. Ford Motor Credit Co.,* 588 F.2d 753, 757-59 (9th Cir. 1978).

to follow a clear interpretation of the Federal Reserve Board which has been charged by Congress with the primary responsibility for interpreting and applying the Truth in Lending Act.

The decision in these cases reflects present uncertainty and generates more uncertainty in an important area of the national economy where certainty and predictability are essential to maintain the free flow of credit. If allowed to stand, it places in jeopardy millions of consumer credit transactions entered into in good faith reliance upon the interpretations of the Federal Reserve Board and the decisions of the other Circuits. This Court must step in to bring some order out of what can only be described as chaos in the lower federal courts.

REASONS FOR GRANTING THE WRIT.

I.
Introduction.

There are an estimated 60,000,000 consumer credit contracts outstanding in the United States today representing more than $265,000,000,000 in total consumer installment indebtedness.[3] Although these installment contracts vary significantly in their credit terms, they all contain one clause in common: an acceleration clause.[4] The acceleration clause provides that upon the debtor's default, the creditor may accelerate the maturity of all remaining installments.

All of these consumer credit contracts are subject to the Truth in Lending Act [15 U.S.C. §§ 1601 *et seq.*] (herein the "Act") and Regulation Z [12 C.F.R. § 226] promulgated by the Federal Reserve Board (herein the "Board"). The stated purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him

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[3]According to the Federal Reserve Board, total consumer installment indebtedness outstanding in the United States during November of 1978 was $269,445,000,000. 65 *Federal Reserve Bulletin* A42 (Table 1.55) (1979). Although no exact figures are available with respect to the total number of individual transactions that comprise this total, the amount of the average transaction appears to be less than $4,000. *See Finance Facts Yearbook 1977*, pp. 46-47 (published by the Consumer Credit Education Foundation, Library of Congress Catalog Card No. 61-14409). Based on this average, the estimate of 60,000,000 separate transactions is probably conservative.

[4]*See Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 264 (3d Cir. 1975); II *G. Gilmore, Security Interests in Personal Property* 1195 (1965) ("For a hundred years, it may be, no security agreement has failed to include an acceleration clause.").

and avoid the uninformed use of credit." Truth in Lending Act § 102(a) [15 U.S.C. § 1601(a)]. The Act and the Regulation seek to achieve this goal by requiring uniform statements of credit terms to be given to consumers.

In an effort to promote uniformity, the Act and Regulation Z describe with particularity the various disclosures that are required to be made, in some cases even dictating the precise terminology that must be used. *See, e.g.*, Regulation Z §§ 226.8(b)(2), 226.8(b)(3), 226.8(c) and 226.8(d). Although specific numerical and descriptive disclosures are prescribed, neither the Act nor the Regulation require disclosure of the existence of an acceleration clause.

The Federal Reserve Board, which was charged by Congress with the responsibility for interpreting the Act, has confirmed that the existence of an acceleration clause need not be disclosed. The Board has ruled, however, that where an indebtedness is paid in full after acceleration and the consumer is not credited with the same rebate of unearned finance charges that would have been made in the event that the indebtedness had been voluntarily prepaid in full prior to acceleration, the extra charge must be disclosed to the consumer as a default charge under Section 226.8(b)(4) of Regulation Z. Ford Credit *does not* charge a consumer a greater amount to pay the indebtedness in full after acceleration than he would have been required to pay had the indebtedness been prepaid in full prior to acceleration. In accordance with the prepayment provisions of its disclosure statements, Ford Credit's policy is to rebate unearned finance charges upon payment in full following acceleration

in the same manner in which it would rebate upon a voluntary prepayment in full.[5]

During the past forty months, the United States Courts of Appeal for six different Circuits have examined the application of the Act and Regulation Z to acceleration clauses in consumer credit contracts. Despite the clarity of the Board's position, none of the Circuits have adopted that position in total. The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions.

The conflicting and confusing positions that the Circuits have taken on the acceleration issue prompted one Court to aptly observe in frustration that "the Circuits are in disarray." *St. Germain v. Bank of Hawaii,* 573 F.2d 572, 573 (9th Cir. 1977).

This conflict and confusion among the Circuits and the Board has an enormous, adverse impact upon the consumer credit industry. As noted above, all consumer credit contracts contain an acceleration clause. Creditors

[5]*See* note 1, *supra.* In *Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1978), a case involving a similar Ford Credit form of contract and Ford Credit's identical policy with respect to rebating unearned finance charges upon payment following acceleration, the Eighth Circuit noted: "It is undisputed that the creditor's policy in this case is to rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement." 577 F.2d at 460 n.6.

making a conscientious and good faith effort to comply with the Act and Regulation Z are left with no clear guidelines as to what disclosures are required and face enormous civil penalties if they guess wrong. Because of the conflicting Circuit Court decisions, a consumer installment contract that complies with the Act and Regulation Z in one jurisdiction may be in violation when used in other jurisdictions. Unless this Court intervenes, the consumer credit industry will continue to be plagued with needless and costly uncertainty, lack of uniformity and hopeless confusion.

II.

The Decision Below Is in Conflict With Interpretations of the Federal Reserve Board and the Decisions of the Third, Fifth, Eighth, Tenth and District of Columbia Circuits.

A. Introductory Summary of the Conflicting Board and Circuit Court Positions.

Section 128(a)(9) of the Act and Section 226.8 (b)(4) of Regulation Z deal with default charges and both require a creditor to disclose any "default, delinquency, or similar charges payable in the event of late payments." Section 226.8(b)(7) of Regulation Z, which has no counterpart in the Act, focuses upon the prepayment of a consumer credit contract in which finance charges have been precomputed and added to the contract balance. Simply stated, Section 226.8 (b)(7) requires the disclosure of the method by which any unearned portion of the finance charge will be rebated to the consumer when the contract is prepaid in full. These two provisions constitute the basis of all of the claims litigated in the lower courts which assert that the existence of an acceleration clause in

a consumer credit contract gives rise to additional disclosure requirements under the Truth in Lending Act.

The Federal Reserve Board has taken the position that the mere existence of an acceleration clause in a contract does not of itself result in a charge under Section 128(a)(9) of the Act or Section 226.8(b)(4) of Regulation Z. The Board has taken the position, however, that an acceleration clause can result in a "charge" under these sections if upon payment in full following acceleration the creditor does not rebate the unearned finance charge by a method at least as favorable to the consumer as the method disclosed for rebating finance charges in the event of a voluntary prepayment in full. This view appears to be followed by the most recent decisions in the Fifth Circuit. *See McDaniel v. Fulton National Bank,* 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied,* 576 F.2d 1156 (5th Cir. 1978) (*en banc*); *Kennedy v. Plaza Pontiac, Inc.,* 589 F.2d 161 (5th Cir. 1979). Applying this view to the facts in the instant case, Ford Credit's contract would not violate the Truth in Lending Act since Ford Credit rebates unearned finance charges in the event of a prepayment in full following acceleration in the same manner in which it rebates unearned finance charges in the event of a voluntary prepayment. The method of calculating the rebate upon any prepayment, whether voluntary or involuntary, is disclosed to the consumer in accordance with the requirements of Section 226.8(b)(7) of Regulation Z at paragraph (14) of the disclosure statement on the face of Ford Credit's contract form.

The Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975) and the

District of Columbia Circuit in *Price v. Franklin Investment Co., Inc.,* 574 F.2d 594 (D.C. Cir. 1978) have taken a similar view, at least where the creditor is required by state law to rebate unearned finance charges.[6] Thus, under the approach taken by the Third Circuit and the District of Columbia Circuit, Ford Credit's contract and policies with respect to rebating unearned finance charges in the event of prepayment following acceleration would not result in a violation of the Truth in Lending Act.

Some Circuits have rejected the view of the Federal Reserve Board and taken the position that *under no circumstances* does the existence of an acceleration clause in a contract give rise to any disclosure requirements under the Truth in Lending Act. This was the position originally taken by the Fifth Circuit in *Martin v. Commercial Securities Co.,* 539 F.2d 521 (5th Cir. 1976):

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[6]Ford Credit's contract even comports with this narrower interpretation since Oregon law requires a rebate of unearned finance charges if the customer prepays his account in full subsequent to acceleration. O.R.S., Section 83.620(1) provides:

> "Notwithstanding the provisions of a retail instalment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail instalment contract. Upon such premature payment, the buyer shall receive a refund credit."

Although the caption to this section is "Voluntary prepayment by buyer—refund", the statute can not logically be construed to permit a creditor to cut off the buyer's right to a prepayment rebate by the act of acceleration. As noted by the U.S. Court of Appeals for the Eighth Circuit in *Griffith v. Superior Ford,* 577 F.2d 455, 460 n.7 (8th Cir. 1978) the reference to "maturity" both in the statute and in the disclosure statement "could have reference only to the stated maturity of the unpaid installment" and not to maturity resulting from acceleration. Moreover, the caption to Section 83.620(1) was not a part of the legislative enactment, but was added by the legislative counsel who prepares the statutes for publication. *See* Or. L. 1977, ch. 692, § 1; Or. L. 1957, ch. 625, § 24.

"Affording the substantial weight to the Solomon letter that *Philbeck v. Timmers Chevrolet, Inc.* [499 F.2d 971 (5th Cir. 1974)], mandates, we nevertheless can not accept the staff's interpretation of the requirements of sections 226.8(b)(4) and 226.8(b)(7). With deference, we find its one-sentence conclusion that an acceleration of payments is essentially a prepayment of the contract obligation to be an analytical construction of regulatory intent which has not been expressed in language that 'all who run may read.' In the installment credit context prepayment and acceleration appear to be conceptually antithetical. The former is the unilateral act of the debtor; the latter the unilateral act of the creditor in the typical installment contract.

In summary, while we recognize that one who applies for installment credit may be as concerned about the lender's rebate policy with respect to unearned finance charges in the event of acceleration as he is with such policy upon prepayment, we leave it to the Board to make explicit what Mr. Solomon finds implicit in a regulation which has provoked so much disagreement in conscientious trial courts.

We hold that in the absence of a regulation requiring it, failure to disclose an acceleration clause and the lender's rebate policy with respect thereto in an installment credit transaction does not give rise to a claim for statutory damages." 539 F.2d at 529 [footnotes omitted].[7]

[7]The *Martin* decision was subsequently overruled in part by the Fifth Circuit in *McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978).

This approach has been followed by the Tenth Circuit in *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977):

> "We are persuaded that the view taken by the Fifth Circuit in *Martin v. Commercial Securities Co., Inc.*, supra, is the proper one on the merits of the question before us. Such an acceleration provision is a universal one, as *Johnson v. McCrackin-Sturman Ford, Inc.*, points out, supra, 527 F.2d at 264. The Federal Reserve Board has issued no regulation on the problem, despite the rather extensive litigation on the question. In these circumstances we are of the view that there is no additional 'charge' in the acceleration provision. . . .
>
> . . . We agree with the *Martin* opinion that the letter [Public Information Letter No. 851, *infra*] is not persuasive and that we should leave it to the Board to make such a disclosure requirement explicit by regulation." 550 F.2d at 1248-49.

Similarly, in *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), in a case involving a similar Ford Credit form of contract and Ford Credit's identical rebate policy upon acceleration, the Eighth Circuit held:

> "Defendants' disclosure statement fully complies with the Act and Regulation Z in describing the method of rebate in the event of prepayment. Regulation Z, fairly read, requires only the disclosure of the consequences of *prepayment*, not the effect of the exercise of a right to accelerate. In our judgment, no such additional disclosure

requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board." 577 F.2d at 460 (emphasis in original).

Under the law expressed by the Eighth and Tenth Circuits and as originally expressed by the Fifth Circuit, in the cases cited above, Ford Credit's form of contract and policy with respect to rebating unearned finance charges upon payment in full following acceleration clearly do not give rise to a violation of the Truth in Lending Act.

The Ninth Circuit's approach is in direct conflict with the approach taken by the Federal Reserve Board and the Third, Fifth, Eighth, Tenth and District of Columbia Circuits. The Ninth Circuit held that the existence of an acceleration clause and a creditor's rebate policy upon acceleration must be disclosed notwithstanding the fact that the creditor rebates unearned finance charges upon payment in full following acceleration by the same method disclosed for prepayment in full.

B. Position of the Federal Reserve Board.

In a series of Public Information Letters and an Official Staff Interpretation, the Federal Reserve Board has consistently declared that an acceleration clause

need not be disclosed under the Act or Regulation Z if the creditor rebates unearned finance charges upon payment of the indebtedness after acceleration in accordance with its disclosed method of rebating unearned finance charges upon voluntary prepayment.

1. *The Board's Position on Section 226.8(b)(4).* In its Official Staff Interpretation No. FC-0054 (App. D at 52a-56a), the Board specifically stated that a *right* of acceleration, in and of itself, is not a default, delinquency or similar charge under Section 226.8(b)(4). In the same Official Staff Interpretation, the Board also affirmed its earlier Public Information Letter No. 851 (App. E at 57a-58a) which stated that no disclosure is required under Section 226.8(b)(4) in connection with the exercise of the right of acceleration as long as the creditor rebates unearned finance charges to the consumer upon payment of the indebtednesss following acceleration:

> "Staff understands that letter [Public Information Letter No. 851] to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8 (b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8(b)(4)." App. D at 53a (emphasis in original).

Approximately three months after the issuance of Official Staff Interpretation No. FC-0054, the Board's position was reaffirmed and reiterated in Public Information Letter No. 1208 (App. F at 59a-60a). That letter stated that in determining whether the creditor's rebate method applicable to payment after acceleration is the same as the rebate method applicable to voluntary payment, the controlling factor "is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation." *Accord,* Federal Reserve Board Public Information Letter No. 1324 (App. G at 61a-63a).

The Board's analysis of Section 226.8(b)(4) can be summarized as follows: if the creditor discloses a rebate provision relating to prepayment and actually rebates to the consumer unearned finance charges upon payment of the indebtedness after acceleration, neither the existence nor the exercise of the right of acceleration, nor payment after acceleration, will result in the imposition of any additional late payment "charge" upon the debtor. Ford Credit's contract and rebate policy clearly comply with this guideline.

2. *The Board's Position on Section 226.8(b)(7).* In its Official Staff Interpretation (No. FC-0054), the Board made it clear that it views a payment of the indebtedness following acceleration as tantamount to a "prepayment" of the obligation for purposes of Section 226.8(b)(7). As long as the creditor's rebate practice is the same for both voluntary prepayment and prepayment following acceleration, only one rebate disclosure is required by Section 226.8(b)(7). Ford Credit's rebate practice is the same for both voluntary prepayment and prepayment following acceleration and this rebate practice is fully disclosed in Ford Credit's disclosure statement. Ford Credit's contract disclosures therefore comply with the Board's interpretation.

Despite the clarity of the Board's position concerning Sections 226.8(b)(4) and 226.8(b)(7), the Circuits have reached widely conflicting results concerning the disclosure requirements imposed by these Sections.

C. The Third Circuit.

The first Circuit Court to analyze the acceleration issue was the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975). In that case, the Court considered whether a creditor was required to disclose the existence of an acceleration clause where state law provided that the creditor must rebate unearned finance charges in the event of a payment after acceleration. The Court held that "when a creditor is required to rebate the unearned portion of the finance charge, his right of acceleration is not a 'default, delinquency or similar charge.'" 527 F.2d at 268.

Although the decision of the Third Circuit is consistent with the position of the Federal Reserve Board, the Court specifically declined to consider whether the result would be the same where the creditor is not required by state law to rebate the unearned finance charge upon payment after acceleration. *See* 527 F.2d at 260 n.3.[8]

[8]Contrary to the assertion of the Ninth Circuit in *St. Germain,* the Third Circuit did not hold "that retained interest is a 'charge,' the existence of which must be disclosed, unless, under state law, the retained interest must be rebated upon acceleration." *St. Germain v. Bank of Hawaii,* 573 F.2d 572, 575

(This footnote is continued on next page)

D. The Fifth Circuit.

The confusion rampant in the lower courts is reflected in the vacillation in approach taken in the Fifth Circuit. The Fifth Circuit has issued six separate opinions on the acceleration issue, including two opinions rendered by the Court *en banc*. The acceleration problem was first brought before the Fifth Circuit in *Martin v. Commercial Securities Co.*, 539 F.2d 521 (5th Cir. 1976). In that case, the Court held that no disclosures are ever required by reason of an acceleration clause in a consumer credit contract, even where the creditor makes no rebate of unearned finance charges upon payment in full after acceleration. The Court declined to follow the Board's Public Information Letter No. 851 and rejected the Third Circuit decision in *Johnson v. McCrackin-Sturman Ford, Inc.*, *supra*.

A few months later, in *McDaniel v. Fulton National Bank*, 543 F.2d 568 (5th Cir. 1976), another panel of the Fifth Circuit followed the decision in *Martin*, although intimating its displeasure with the holding in *Martin*. Approximately sixteen months later, the Fifth Circuit, sitting *en banc*, reversed the earlier decision in *McDaniel*. *McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978) (*en banc*). In this third opinion, the Court reasoned that when an indebtedness is paid in full after acceleration and the customer is not credited with the same rebate of un-

(9th Cir. 1977). Rather, the Third Circuit merely held that acceleration is not a "charge" if state law requires unearned interest to be rebated upon acceleration. The Court specifically reserved and kept open the issue as to whether or not it would be a charge even if state law did not require such a rebate. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 260 n.3 (3d Cir. 1975).

earned finance charges that would have been made in the event of a voluntary prepayment, the additional charge is in the nature of "default, delinquency, or similar charges payable in the event of late payments." The Court quoted extensively from Official Staff Interpretation No. FC-0054 and unequivocally approved the Board's position: "We adopt it as the rule of decision in these cases." 571 F.2d at 951.

In a fourth opinion denying a petition for a rehearing from the second *McDaniel* decision, the Fifth Circuit retracted its prior unconditional approval of the Board's interpretation. *McDaniel v. Fulton National Bank*, 576 F.2d 1156 (5th Cir. 1978) (*en banc*). The Court held that if the contract permits the creditor to collect unearned finance charges upon payment following acceleration, this contract right will be viewed as a default charge that must be disclosed under Section 226.8(b)(4) regardless of the creditor's actual practice in enforcing this contract right. In this respect, the fourth opinion is in direct conflict with the Board's Public Information Letter No. 1208.

In its most recent two pronouncements on the subject, however, the Fifth Circuit appears to have reverted to the position announced in the second *McDaniel* opinion. *See Kennedy v. Plaza Pontiac*, 589 F. 2d 161 (5th Cir. 1979).[9] *Accord, Burley v. Bastrop Loan Co.*, 590 F.2d 160 (5th Cir. 1979).

[9] In a footnote to the per curiam opinion in *Kennedy v. Plaza Pontiac*, the Court summed up the position of the Fifth Circuit:

> "Since our decision, the *Martin* rule has been modified by our court en banc to require disclosure of rebate provisions on acceleration where the creditor does not rebate unearned finance charges in accordance with disclosed provisions for rebate upon prepayment." 589 F.2d at 161 n.1.

E. The Tenth Circuit.

Prior to the Fifth Circuit's *en banc* decision in the second *McDaniel* opinion, the Tenth Circuit resolved the acceleration issue by following the Fifth Circuit decision in *Martin*. *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977). The Tenth Circuit thus holds that no disclosures are ever required with respect to an acceleration clause. The subsequent reversal by the Fifth Circuit of its opinion in *Martin* has now left the Tenth Circuit in conflict with both the Third Circuit and the Fifth Circuit. The Tenth Circuit recently reaffirmed its position in *United States v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

F. The District of Columbia Circuit.

The District of Columbia Circuit rendered its decision regarding the disclosure of acceleration clauses in *Price v. Franklin Investment Co.*, 574 F.2d 594 (D.C. Cir. 1978). The District of Columbia Circuit chose to follow the decision of the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc., supra.*

G. The Eighth Circuit.

The Court of Appeals for the Eighth Circuit considered the acceleration issue in *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978). The Court surveyed and critiqued the conflicting Circuit Court decisions on the acceleration issue and specifically criticized both the logical and legal inconsistencies inherent in the approaches of the Ninth and Fifth Circuits. While noting that its decision, under the facts in that case, was consistent with both the approach taken by the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.* and the position of the Federal Reserve Board,

it adopted the position originally taken by the Fifth Circuit in *Martin* and by the Tenth Circuit in *Begay* that no disclosures are required by reason of an acceleration clause.

H. The Ninth Circuit.

The approach taken by the Ninth Circuit to the acceleration clause issue not only is in direct conflict with the decisions in the Third, Fifth, Eighth, Tenth and District of Columbia Circuits but is also erroneous. The Ninth Circuit faced the acceleration issue in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977). There the Court expressly rejected the Third Circuit's decision in *Johnson*, the Fifth Circuit's ruling in *Martin*, and the Tenth Circuit's view expressed in *Begay*. The Court also criticized the Federal Reserve Board for issuing "conflicting signals." 573 F.2d at 573. Adopting what it called "the Board's alternative prepayment theory" (573 F.2d at 577), the Court claimed to have "cut a clean path through the thicket." 573 F.2d at 577. Unfortunately, the ambiguity and inconsistency in the Ninth Circuit's approach has resulted in even greater confusion. Essentially, the Ninth Circuit held that:

> (1) The Federal Reserve Board and other Circuits are in error to the extent that they require default charge disclosures under Section 226.8(b)(4) since that section is inapplicable to acceleration clauses;
>
> (2) The creditor's *act* of acceleration constitutes a "prepayment" within the meaning of Section 226.8(b)(7) of Regulation Z;
>
> (3) The creditor must therefore disclose whether, and if so the manner in which, unearned

finance charges will be rebated upon the creditor's exercise of its right of acceleration;

(4) The creditor's disclosure with respect to voluntary prepayment will not suffice to satisfy this requirement; and

(5) The creditor must disclose the existence of the acceleration clause.

The Ninth Circuit's novel and unprecedented decision relying upon Section 226.8(b)(7) came as a complete surprise to the consumer credit industry. The Court's theory produces two analytic anomalies: First, the Court equated the acceleration of an indebtedness with "prepayment" of the indebtedness. Clearly, the acceleration of an indebtedness is not a payment of any kind, let alone a "prepayment." As the Fifth Circuit noted in *Martin*, "prepayment and acceleration appear to be conceptually antithetical. The former is the unilateral act of the debtor; the latter the unilateral act of the creditor in the typical installment contract." *Martin v. Commercial Securities Co.*, 539 F.2d 521, 529 (5th Cir. 1976). Second, although the Court stated that it could "perceive no serious textual impediment to reading Section 226.8(b)(7) prepayment to include involuntary prepayment (acceleration) as well as voluntary prepayment" (573 F.2d at 576), the Court, with complete and totally unexplained inconsistency, perceived that the creditor's disclosure of its method of rebate upon "prepayment" did not apply to prepayment following an acceleration. This inconsistency was criticized by the Eighth Circuit in the *Griffith* case:

"*St. Germain v. Bank of Hawaii, supra,* mandates disclosure of whether and how a rebate of unearned interest will be made by equating acceleration with prepayment (the concept advanced in Federal Reserve Board staff pronouncements), although acknowledging that 'the prepayment concept is not without its own problems.' 573 F.2d at 576. One such problem is that if acceleration and prepayment are equivalents, then the creditor's disclosure respecting rebate upon *prepayment* would comply with the *only* express requirement of § 226.8(b)(7) of Regulation Z . . . ." *Griffith v. Superior Ford,* 577 F.2d 455, 459 (8th Cir. 1978) (emphasis in original; footnote omitted).

The decision of the Ninth Circuit in *St. Germain* was followed by the Ninth Circuit in the decision below without further clarification or analysis.[10]

The Ninth Circuit opinion in *St. Germain* is not only in conflict with the position of the Board and the other Circuit Courts, it is plainly wrong. All that the statute and Regulation require is that default, delinquency and similar charges be disclosed and that the creditor's method of calculating a rebate upon prepayment in full be disclosed. Ford Credit's disclosures in these cases fully comply with both of these requirements. A lender's rebate policy upon payment after acceleration is clearly not a "charge" if it does not enable the creditor to retain unearned finance charges. Ford Credit's contract and disclosures in these cases clearly provide for a rebate of any unearned finance charges upon prepayment, and this includes any prepayment resulting from an acceleration of the contract. In accordance with its contract and disclosure,

[10] The parties in *St. Germain* did not petition for a writ of certiorari.

Ford Credit's practice is to rebate unearned finance charges upon payment after acceleration.

In a companion case to *St. Germain*, the Ninth Circuit in *Kessler v. Associates Financial Services Co.*, 573 F.2d 577 (9th Cir. 1977) affirmed that portion of a district court decision holding that an acceleration clause had not been properly disclosed, but reversed the district court's decision to apply its decision prospectively only. In its opinion in *Kessler*, the Court acknowledged the uncertainties caused by the conflicting interpretations of the Act and Regulation and the difficulties that presents to creditors attempting to draft disclosure forms:

> "We share the district court's concern that the vagaries of the construction of TILA and Regulation Z can be traps for even wary lenders and that the end product of requiring more and more revelations in disclosure statements can ultimately defeat the informative purposes that Congress had in mind because the disclosure statements will become as complex, unreadable, and often as unread as the underlying contracts. As real as those concerns are, however, redress lies with Congress and the Federal Reserve Board, not with the courts." 573 F.2d at 578.

The Ninth Circuit noted that Congress was silent on the disclosure of acceleration clauses ("Congressional silence is a dubious indicium of legislative intent" [*St. Germain v. Bank of Hawaii, supra*, 573 F.2d at 574]) and agreed that additional disclosures could "ultimately defeat the informative purposes that Congress had in mind" (*Kessler v. Associates Financial Services Co., supra*, 573 F.2d at 578). The Court nevertheless chose to require a disclosure that is not

explicitly or implicitly required by either the Act or Regulation Z and that runs contrary to the clear interpretations of the Federal Reserve Board and every other Circuit Court that has decided the issue. While recognizing that "the vagaries of the construction of TILA and Regulation Z can be traps for even wary lenders" (*Kessler v. Associates Financial Services Co., supra*, 573 F.2d at 578) the Court has sprung that trap on the lenders thereby exposing the credit industry to liability for statutory penalties on millions of consumer credit transactions and leaving the creditors to the solace that "redress lies with Congress and the Federal Reserve Board" (*Kessler v. Associates Financial Services Co., supra*, 573 F.2d at 578) even though such results were never contemplated by Congress[11] and have been expressly rejected by the Board.

III.

The Decision Below Throws Open to Serious Question the Validity of Millions of Consumer Credit Disclosure Forms Under the Truth in Lending Act.

As a result of these conflicting decisions, many consumer installment contracts that comply with the Act and Regulation Z in one jurisdiction will be found in violation of the Act and Regulation in another

[11] In fact, the legislative history demonstrates that Congress' silence was not unintentional since Congress considered the exercise by a creditor of its remedies upon default and the effect of those remedies on the rates disclosed to the consumer to be a "subsequent occurrence" under 15 U.S.C. § 1634. The Senate report on Section 4(h) of S.5, which became 15 U.S.C. § 1634, states:

> "A repossession permitted by state law but not mutually agreed to by both parties would affect the rate. The new language makes it clear that such a change would not violate the act." S. Report No. 392, 90th Cong., 1st Sess. 18 (1967).

Acceleration, like repossession, is a remedy of the creditor upon default.

jurisdiction. In still other jurisdictions, the status of the law on this important question is unclear. This conflict and confusion defeats the nationwide uniformity that Congress sought to achieve in adopting the Act. This Court should intervene in order to eliminate these irreconcilable conflicts and promote uniformity of decision and disclosure.

Although the dollar amount involved in these cases may appear to be small, the potential civil liability facing creditors whose forms do not comply with the Ninth Circuit's novel and unprecedented holding is truly staggering.

Under the Act, one single violation of the disclosure requirements of either the Act or Regulation Z exposes a creditor to civil liability equal to double the amount of the finance charges imposed in the transaction, with a maximum liability of $1,000 and a minimum liability of $100.00. Truth in Lending Act § 130(a) [15 U.S.C. § 1640(a)]. This liability is penal in nature since it is imposed without regard to whether the debtor suffered any actual damage and without regard to whether the creditor's violation was intentional.

Since there are well in excess of 60,000,000 consumer installment contracts in existence today, virtually all of which contain an acceleration clause, the consumer credit industry has an enormous stake in the outcome of this action. The decision of the Court below on the acceleration question represents a radical and unprecedented departure from prior judicial decisions and Board interpretations. The Court's holding that the

right to accelerate an indebtedness somehow constitutes a "prepayment" of the indebtedness conflicts with the plain meaning of the term "prepayment" as used in Section 226.8(b)(7) and defies logic and common sense. Few, if any, creditors could have anticipated such a strained construction of Regulation Z with the result that millions of disclosure statements now violate the Act and Regulation Z. These unforeseen and unavoidable violations may result in huge penalties being imposed against creditors. This Court should intervene to prevent such an injustice from occurring.

Without regard to what disclosure rule ultimately evolves out of the conflicting decisions on the acceleration issue, the consumer credit industry should at least be provided with a consistent and uniform interpretation of the Act and Regulation Z that can be used in drafting disclosure forms. Given the current state of confusion and chaos in the Circuits on the acceleration issue, only this Court can provide such uniformity.

Conclusion.

Under the decisions of the Ninth Circuit, countless millions of disclosure statements have been thrown into violation of the Truth in Lending Act and Regulation Z. In five other Circuits, the same disclosure forms that were held in violation of the Act and Regulation Z below would be valid, and in another five Circuits the fate of the forms is as yet undecided. Six Circuits and the Federal Reserve Board have issued rulings upon this matter. They are in conflict. The issues far transcend the instant case. The matter is now ripe

for consideration by this Court. For all of the above reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Dated: March 26, 1979.

APPENDIX A

United States Court of Appeals for the Ninth Circuit.

Dennis Milhollin and Michelle Milhollin, Plaintiffs-Appellees, v. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation, Defendants-Appellants.

Dennis Milhollin and Michelle Milhollin, Plaintiffs-Cross Appellants, v. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation, Defendants-Cross Appellees.

Donna M. Eaton, Plaintiff-Appellee, v. Ford Motor Credit Co., a corporation, Defendant-Appellant, Bud Meadows Mazda, Inc., Defendant.

Darrell Messinger, Plaintiff-Appellee, v. Ford Motor Credit Co., a corporation, and Marv Tonkin Ford Sales, Inc., a corporation, Defendants-Appellants.

David P. Andresen, Plaintiff-Appellee, v. Ford Motor Credit Co., a corporation, and Webster-Wolfard Ford, Inc., a corporation, Defendants-Appellants, and The California Loan and Finance Association, Amicus Curiae. Nos. 76-2914, 76-3217, 77-3084, 77-3584 and 77-3569.

Appeal from the United States District Court for the District of Oregon.

Decided: December 28, 1978.

Before WRIGHT and GOODWIN, Circuit Judges, and JAMESON,* District Judge.

EUGENE A. WRIGHT, Circuit Judge:

In these consolidated cases, Ford Motor Credit Corporation (Ford Credit) and several Ford dealers appeal

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*Senior District Judge, District of Montana.

from adverse judgments finding that they violated provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1976) (Act) and the regulations promulgated thereunder, 12 C.F.R. § 226.1 *et seq.* (1978) (Regulation Z).[1] Milhollin cross appeals from a limitation of Ford Credit's liability.

Although plaintiffs below (Consumers) allege a number of violations, we need to decide only two issues common to the above cases and one issue raised by the Milhollins:

(1) Whether Ford Credit was clearly identified as a creditor on the face of the contract;

(2) Whether it is necessary to disclose an acceleration clause on the face of the contract; and

(3) Whether an inadequate disclosure made to a husband and wife as joint obligors results in a multiple recovery.

I.
FACTS[2]

Ford Credit, wholly owned by the Ford Motor Company, provides financing for Ford dealers by extending operating and inventory loans and by purchasing retail installment contracts for the sale of automobiles by dealers.

A Ford Credit booklet explains its program to dealers and gives guidelines for drafting contracts it is willing to purchase. It also provides forms of credit applications, contracts and rate charts for calculating finance charges. Use of the supplied forms is not mandatory,

[1]Sections of Regulation Z cited here have remained the same in all relevant respects since these actions arose.

[2]These are the facts common to all above cases. Facts unique to a single case are presented later in the text, as necessary.

and Ford Credit purchases contracts on other agreement forms. Many dealers disregard the suggested rate charts and develop their own finance charges.

Dealers negotiate all terms of contracts directly with customers, including the interest rate. Contracts are typically assigned shortly after sales are consummated. Although Ford Credit normally is unaware of any specific sale until the contract is proffered for assignment, dealers may get prior approval for customers with marginal credit ratings.

Ford Credit is not obligated to purchase any contracts from dealers, but usually rejects only a small percentage of those offered. It pays dealers cash for the contracts less its discount.

Each dealer here has assigned the great majority of its contracts to Ford Credit.[3] Shortly after each sale Ford Credit purchased the contract, notified the buyer, and provided him a payment book. Consumers made subsequent payments to Ford Credit.

II.
DISCLOSURE OF FORD CREDIT AS A CREDITOR

In each of these cases, the district court found that Ford Credit was not clearly identified as a creditor on the face of the contract, and that this nondisclosure violated the Act and Regulation Z. To uphold the district court, we must conclude that (a) the identity of each creditor is a required disclosure under the Act or Regulation Z; (b) Ford Credit is a creditor

[3]In *Messinger*, of 600 to 700 contracts assigned six months prior to and six months after the transaction with the plaintiff, the dealer assigned all but 100 to Ford Credit. The dealer in *Andresen* assigned 90% of its contracts to Ford Credit.

in these transactions within the meaning of the Act; and (c) Ford Credit's status as a creditor was not adequately disclosed on the face of the contract.

Consumers maintain that Regulation Z requires the disclosure of each creditor to a transaction on the face of the contract.[4] A number of courts have agreed.[5] Consumers also interpret a Federal Reserve Board Official Staff Interpretation of Regulation Z to require disclosure of each creditor.[6] Ford Credit reads the

[4]Regulation Z provides:

> "*General rule.* Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969 . . [S]uch disclosures shall be made before the transaction is consummated. At the time disclosures are made, *the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified.*"

12 C.F.R. § 226.8(a) (1978) (emphasis added).

> "*Multiple creditors or lessors; joint disclosure.* If there is more than one creditor or lessor in a transaction, *each creditor or lessor shall be clearly identified* and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, *each creditor or lessor shall be clearly identified.*"

Id. at § 226.6(d) (emphasis added).

[5]*E.g., Lauletta v. Valley Buick, Inc.,* 421 F.Supp. 1036, 1039 (W.D.Pa.1976); *Pedro v. Pacific Plan of California,* 393 F.Supp. 315, 319-20 (N.D.Cal.1975).

Although this court has not addressed this precise issue, it intimated that the identification of each creditor is required by invalidating a disclosure statement that did not identify one of two joint creditors in its description of that element of the finance charge going to that creditor. *Ljepava v. M. L. S. C. Properties, Inc.,* 511 F.2d 935, 942 (9th Cir. 1975) (citing 12 C.F.R. §§ 226.6(d), 226.8(d)(3) (1974)).

[6]In 1976 the Federal Reserve Board was asked whether a disclosure statement in which the finance charge, annual percentage rate, and name of the creditor were printed in

Official Interpretation narrowly to reach an opposite result.[7]

Consumers allege that Ford Credit is a creditor within the meaning of the Act[8] because it extended credit directly to them, using the dealers merely as a means to arrange for the credit. Ford Credit argues that it was a subsequent assignee of the retail installment contract, extending only commercial credit to the dealers. It cites the apparently different treatment accorded an "original creditor" and a "subsequent assignee" in various sections of the Act as evidence that Congress did not intend subsequent assignees to

the same size type satisfied the requirements of 12 C.F.R. § 226.6(a) (1978), which states that the terms "finance charge" and "annual percentage rate" "shall be printed more conspicuously than other terminology required by this part."

The Board's response, issued prusuant to the authority granted by 12 C.F.R. § 226.1(d) (1978), stated: "Although *the identification of a creditor is a required disclosure under § 226.-8(a),* this disclosure does not constitute required 'terminology.'" Official Staff Interpretation of Regulation Z, 41 Fed.Reg. 41908 (1976) (Emphasis added).

We have held that "[g]reat deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretative and enforcement powers granted this agency by Congress under the Truth in Lending Act." *Bone v. Hibernia Bank,* 493 F.2d 135, 139 (9th Cir. 1974). *See also Anthony v. Community Loan & Investment Corp.,* 559 F.2d 1363, 1367 (5th Cir. 1977); *Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257, 267 n.23 (3d Cir. 1975).

[7]Ford Credit relies on the strained reading given 12 C.F.R. § 226.8(a) (1978) and the Official Staff Interpretation in *Grey v. European Health Spas, Inc.,* 428 F.Supp. 841, 843 (D.Conn.1977).

[8]Regulation Z defines "creditor" as

> a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four instalments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

12 C.F.R. § 226.2(s) (1978).

be subject to the same disclosure requirements as creditors.[9] Consumers respond by citing cases that, in certain circumstances, equate subsequent assignees with creditors for disclosure purposes.[10]

For our purposes it is unnecessary to decide whether the identification of each creditor is a required disclosure or if Ford Credit is a creditor of Consumers. Assuming an affirmative answer to these questions, we conclude that the status of Ford Credit, even if it is as a creditor, was adequately disclosed.

On the face of each contract, opposite the signature of Consumers, appears the following disclosure:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof.
> Seller ....
> By .... Title ....

Consumers argue that the terms of 12 C.F.R. § 226.6(d) (1978) which provide that "each creditor . . . shall be clearly identified," are not met by disclosing that Ford Credit would be an assignee of the contract.

[9] *See, e.g.*, 15 U.S.C. §§ 1614, 1640(d), 1641 (1976).

[10] *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-16 (5th Cir. 1976); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 874 n.1 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 91-92 (8th Cir. 1976); *Bird v. Goddards Discount Furniture*, 443 F.Supp. 422, 423-24 (S.D.Ill.1978); *Poirrier v. Charlie's Chevrolet, Inc.*, 442 F.Supp. 894, 895-96 (E.D.Mo.1978); *Cenance v. Bohn Ford, Inc.*, 430 F.Supp. 1064, 1068-69 (E.D.La.1977); *Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1036, 1039 (W.D. Pa.1976); *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928, 930 (E.D.La.1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974); *Kriger v. European Health Spas, Inc., of Milwaukee, Wisconsin*, 363 F.Supp. 334, 336 (E.D.Wis.1973); *Garza v. Chicago Health Clubs, Inc.*, 347 F.Supp. 955, 963-64 (N.D.Ill.1972).

They apparently argue that, because the precise word "creditor" was not used in describing Ford Credit's prospective involvement in the transaction, the Act was violated. We disagree. Nowhere does Regulation Z require use of the word "creditor." Here, the exact role that Ford Credit ultimately played in each transaction was clearly disclosed. Requiring Ford Credit to use the word "creditor" would not have given Consumers additional information nor better served the purposes of the Act.

In *Main v. Faller Ford, Inc.*, Civil Action No. 74-337 (W.D.Pa. Apr. 22, 1976), the court held that an identical statement satisfied the creditor disclosure requirements of Regulation Z:

> Whether Ford Credit may be described as the term is used in [12 C.F.R.] § 226.6(d) need not be decided in this factual context because to require such a disclosure by Ford Credit on a separate piece of paper would not be a meaningful disclosure nor would it further the goals of the Truth-In-Lending Act. Ford Credit was accurately described in the contract as the assignee and it is undisputed that plaintiff personally understood that Ford Credit would actually extend her credit and consequently be the recipient of her monthly installment payments. . . . To require Ford Credit to also disclose to plaintiff that it was also a "creditor" within the Act would be a meaningless and needless exercise providing plaintiff with duplicative information, and such duplication cannot be justified by the Act's purpose nor by the practical considerations of these circumstances.

Accord, Sharp v. Ford Motor Credit Co., 452 F.Supp. 465 (S.D.Ill.1978) (appeal pending); *Antonio v. Canal Motors, Inc.,* Civil Action No. 74-3163 (E.D.La. Nov. 18, 1977) (appeal pending); *Augusta v. Marshall Motor Co.,* 453 F.Supp. 912 (N.D.Ohio 1977) (appeal pending).

We agree with the reasoning in *Main* and hold that the district court erred in finding that Ford Credit was not adequately identified as a creditor on the face of the contract.[11]

III.
DISCLOSURE OF AN ACCELERATION CLAUSE

The reverse side of each contract contained an acceleration clause that did not explain the effect of acceleration on unearned interest. Ford Credit maintains that its uniform practice, although not explicitly disclosed, is to rebate unearned interest to the customer upon acceleration in the same manner as that following a voluntary prepayment.

This court faced a similar situation in *St. Germaine v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977). We held there that

> [t]he creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated.

Id. at 577. Failure to make these disclosures is a violation of the Act.

[11]Since we conclude that Ford Credit's disclosure of its status was adequate, we need not consider the sufficiency of additional disclosures attached to the contract in *Andresen.*

In *Milhollin,* the district court concluded on different grounds than those stated in *St. Germaine* that failure to disclose the acceleration clause on the face of the contract was a violation of the Act. The court held, however, that it would result in liability only after the decision in *Woods v. Beneficial Finance Co. of Eugene,* 395 F.Supp. 9 (D. Or. 1975), the first Oregon case recognizing this nondisclosure as a violation. In so holding, the district court exceeded its authority because "[t]he application of doctrines limiting the retroactivity of judicial decisions is restricted to appellate courts." *Kessler v. Associates Financial Service Co.,* 573 F.2d 577, 579 (9th Cir. 1977).

We hold on the basis of *St. Germaine* that Ford Credit is liable to the Milhollins for failure to disclose the acceleration clause and its effect on unearned interest on the face of the contract.

IV.
RECOVERY FOR INADEQUATE DISCLOSURE BY JOINT OBLIGORS

At the time of the transaction in *Milhollin,* plaintiffs were husband and wife. Both signed the retail installment contract, making them jointly and severally liable for the full debt under Oregon law. They allege that the district court erred in limiting them as joint obligors to one recovery for violations under the Act.

The Act provides:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect *to any person* is liable to *such* person in an amount equal to the sum of—
>
> . . .

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . ., except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . .

15 U.S.C. § 1640(a) (1976). The first quoted words emphasized, "any person" and "such person," suggest that each joint obligor is entitled to a separate recovery. The emphasized words in the second paragraph, however, suggest that the liability for any single transaction is limited to $1,000.

The circuits have split on this issue. The Fifth and Seventh Circuits have concluded that a husband and wife as joint obligors are entitled to separate recoveries. *Davis v. United Companies Mortgage & Inv. of Gretna, Inc.*, 551 F.2d 971 (5th Cir. 1977); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 881-83 (7th Cir. 1976); *Allen v. Beneficial Finance Co. of Gary,* 531 F.2d 797, 805-06 (7th Cir.), cert. denied, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976). The Fourth Circuit reached the opposite result in *Powers v. Sims and Levin,* 542 F.2d 1216, 1219-20 (4th Cir. 1976), in which the court limited the recovery of husband and wife as joint obligors to one penalty.

We believe that the Fourth Circuit's approach more closely reflects the intent of Congress. The applicable legislative history states:

> Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed $1,000 on any individual credit transaction.

H.R.Rep.No. 1040, 90th Cong., 2d Sess., [1968] U.S. Code Cong. & Admin. News, pp. 1962, 1976 (emphasis added). The Milhollins, although joint obligors, entered into one credit transaction with the dealer and Ford Credit. They are entitled to one recovery.

IV.
CONCLUSION

Because the district court in *Andresen and Messinger* concluded Ford Credit violated the Act only on the basis of an inadequate disclosure of its creditor status, a conclusion we reject, we remand those cases for a consideration of other alleged violations of the Act not treated by the court.

Although the district court in *Milhollin* found liability on the ground used in *Andresen* and *Messinger,* it also concluded Ford Credit violated the Act by failing to disclose an acceleration clause on the face of the contract. In light of *St. Germaine,* we disagree with the rationale used by the court, but hold on other grounds that Ford Credit violated the Act by failing to disclose an acceleration clause and its effect on unearned interest. We also disagree with the court's prospective application of *Woods,* and hold that Ford Credit is liable to the Milhollins for its nondisclosure. As joint obligors, they are entitled to only one recovery.

We affirm the holding of the district court in *Eaton,* again under a different rationale,[12] on the basis of

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[12] Noting that it would be "a waste of judicial time and effort" to set forth the reasons for its decisions in light of the thorough discussion in *Milhollin,* then on appeal to this court, the district court in *Eaton* merely adopted the rationale of *Milhollin.* We agree with the conclusion in *Milhollin* that failure to disclose an acceleration clause on the face of a contract is a violation of the Act, but do so on different grounds.

Ford Credit's failure to disclose an acceleration clause and its effect on unearned interest on the face of the contract.[18]

AFFIRMED IN PART AND REVERSED IN PART.

[18]Since multiple violations of the Act in any single credit sale transaction result in only one recovery, 15 U.S.C. § 1640(g) (1976), it is unnecessary to consider any other alleged violations in *Milhollin* and *Eaton*.

APPENDIX B

Recommendation and Order

In the United States District Court for the District of Oregon.

Dennis Milhollin and Michelle Milhollin, Plaintiffs, vs. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation, Defendants. Civil No. 75-334.

Filed: April 7, 1976.

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act ("Act"), and Federal Reserve Board Regulation Z ("Reg. Z"), 12 C.F.R. § 226, *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1640(e).

In July of 1974, plaintiffs, Dennis and Michelle Milhollin, purchased a 1973 Ford Pinto automobile from defendant Dee Thomason Ford on a deferred payment plan. The purchase price was $3,098.00 and the deferred payment price $3,983.64. Plaintiffs put down a cash payment of $400.00 and were allowed a $300.00 trade-in allowance on their old automobile. Additionally, a $200.00 ballon payment to be made August 12, 1974, further increased the down payment to a total of $900.00. The sum of $2,372.80 was financed at an annual percentage rate of 17.91%.

After the $200.00 balloon payment, plaintiffs were to pay 35 monthly installments of $85.68 each and one final installment of $85.84 commencing on August 29, 1974. Because plaintiffs did not maintain property damage insurance on the automobile, the assignee of

the purchase contract, defendant Ford Motor Credit Company ("FMCC"), obtained this insurance and added the premium to the principal. This resulted in the payments due being increased to $94.61 per month beginning with the December 29, 1974, payment.

FMCC, without notification to the plaintiffs, repossessed the automobile on February 21, 1975. FMCC gives as reasons for repossession: (a) default in payment of installments due under the contract (two payments were overdue); (b) failure to supply evidence of insurance; and (c) FMCC deemed the indebtedness and property "insecure." FMCC's answer to plaintiffs' interrogatory 15.

By letter dated the same day as the repossession, February 21, 1975, plaintiffs, through their attorney, offered to pay the delinquent amount. FMCC responded that it had elected to accelerate the amount due. This acceleration had the effect of forcing plaintiffs to pay $2,440.42 rather than the overdue amount in order to redeem the automobile. Plaintiffs were not able to make the payment, and the Pinto was re-sold.

Plaintiffs allege that the contract violated the Act and Reg. Z in four particulars:

(1) Failure to disclose the acceleration clause on the face of the contract;

(2) Failure to disclose clearly and conspicuously that plaintiffs were required to obtain physical damage insurance on the automobile;

(3) Failure to clearly identify FMCC as a creditor on the face of the contract;

(4) Failure to describe or identify the type of security interest retained or acquired by FMCC.

Each plaintiff seeks the maximum allowable damages of $1,000.00.

All parties move for summary judgment. Fed. R. Civ. P. 56. I find that there is no genuine and material issue of fact in dispute.[1] Therefore, this matter is ripe for summary judgment.

I. WAS FMCC A "CREDITOR"?

FMCC contends that it is not subject to the Act or Reg. Z for any violations contained in the contract in that, with regard to this transaction, it is not a "creditor" within the meaning of the statute and regulations. It maintains that assignees were not specifically made subject to the Act until October 28, 1974 (after the contract in issue was executed). Act of Oct. 28, 1974, Pub. L. 93-495, Title IV, § 413(a), 88 Stat. 1520, *adding* 15 U.S.C. § 1614. Therefore, FMCC's argument continues, it could not have been subject to the Act prior to the enactment of § 1614.

Plaintiffs counter with the assertion that FMCC was the true creditor in this transaction, and Dee Thomason was merely a "conduit." Thus, FMCC would have been subject to the Act as a "creditor" even before the enactment of § 1614.

[1]Dee Thomason contends that its attempted good faith compliance with the Act and Reg. Z is a valid defense here, and, in any event, the factual issues of good faith and alleged oral disclosures made to the plaintiff preclude summary judgment. A recent 10th Circuit case, *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975), is cited by Dee Thomason for the proposition that damages are improper in Truth in Lending Act cases where the debtor is supplied with full disclosure, be it on the face of the contract or oral. Insofar as *Redhouse* can be read as holding good faith, oral disclosure, or lack of damage causation to be defenses to violations of the Act or Reg. Z, I respectfully must disagree. I find nothing in the statute or its legislative history which suggests that any standard other than strict liability should be applied.

I agree with the plaintiffs. The conduit approach has been applied in many analogous situations before the enactment of § 1614.[2] Here, at the same time as the sale of the automobile, and in the same transaction, Dee Thomason arranged for the extension of credit by FMCC, and assigned the purchase contract to FMCC. The transaction involving Dee Thomason and FMCC was undertaken pursuant to the usual business practices of defendants in regularly arranging for the extension of credit to consumers. That this was the usual business practice of Dee Thomason and FMCC is evidenced by the following facts: (a) The contract was printed by defendant FMCC, naming FMCC as the assignee; (b) In 1974, Dee Thomason assigned 345 such contracts to FMCC; (c) FMCC financed substantially all of the retail installment contracts signed with Dee Thomason; and (d) The assignments were made pursuant to instructions contained in a booklet issued by FMCC. FMCC's answers to plaintiffs' interrogatories 4, 26 and 27.

Additionally, it should be noted that the terms of the Act itself would seem to apply to FMCC here, even without the judicially engrafted "conduit theory." Section 103(f) of the Act, 15 U.S.C. § 1601(f) defines a creditor as one who:

> [R]egularly extend[s], or arrange[s] for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

[2]See, e.g., *Johnson v. Johnson,* IV CCH Consumer Credit Guide ¶ 98,556, II Poverty Law ¶ 21,220 (M.D. Ga. 1975); *Meyers v. Clearview Dodge Sales, Inc.,* 384 F. Supp. 722 (E.D. La. 1974); *Philbeck v. Timmers Chevrolet, Inc.,* 361 F. Supp. 1255 (N.D. Ga. 1973), *rev'd on other grounds,* 499 F.2d 971 (5th Cir. 1974); *Garza v. Chicago Health Clubs, Inc.,* 347 F. Supp. 955 (N.D. Ill. 1972); *Joseph v. Norman's Health Club, Inc.,* 336 F. Supp. 307 (E.D. Mo. 1971).

I conclude, therefore, that, with respect to the transaction at issue here, FMCC is a creditor within the meaning of the Act.[3]

II. DISCLOSURE OF THE ACCELERATION CLAUSE

The Act requires that the creditor must disclose "the default, delinquency, or similar charges payable in the event of late payments." 15 U.S.C. § 1639(a)(7). Plaintiffs contend that the right of acceleration constitutes a "charge" within the meaning of section 1639(a)(7), and must be disclosed on the face of the contract.

Plaintiffs and FMCC have both provided excellent briefs to the court on this issue. Ample authority supports the position that an acceleration clause is a "charge." Ample authority also supports the position that where, as here, only accrued interest becomes due in case of acceleration, the acceleration clause is not a "charge." I feel compelled both by *stare decisis* and logic to follow Judge Skopil's ruling in *Woods v. Beneficial Finance Co. of Eugene,* 395 F. Supp. 9 (D.Or. 1975). The duty to disclose and fully explain any right of acceleration was made clear in *Woods.* That duty, however, is prospective in this District from the date of the *Woods* decision, February

[3]This holding is, of course, limited to the facts of this case.

14, 1975. 395 F. Supp. at 16. Since the transaction in issue took place before *Woods,* there was no duty at that time upon either Dee Thomason or FMCC to disclose the acceleration clause.[4]

III. DISCLOSURE OF THE INSURANCE REQUIREMENT

Plaintiffs maintain that since failure to obtain property damage insurance on the automobile can result in default and acceleration, it also constitutes a "charge" under section 1639(a)(7), and must be disclosed.

Although plaintiffs' argument is somewhat plausible, it is rejected for two reasons:

(1) 12 C.F.R. § 226.4(a)(6), which sets forth the physical damage insurance disclosure requirements (these being in conjunction with disclosures for the determination of the finance charge), has been complied with. Just above the buyer's signature by which Mr. Milhollin acknowledged his desire to obtain life and disability insurance in connection with the contract appears the notice:

> (2) You have the right to choose the person through whom the Physical Damage Insurance *required* under this contract is to be obtained.
>
> (Emphasis added).

(2) No authority is cited in support of the proposition that FMCC's decision to take out insurance on the automobile because of plaintiffs' failure to do so constitutes a "charge" within the meaning of 15 U.S.C. § 1639(a)(7).

[4]Plaintiffs' suggestion that the defendants' duty after the *Woods* decision was to change those contracts previously entered into is, to say the least, unrealistic.

IV. CLEAR IDENTIFICATION OF FMCC

Section 226.6(b) of Reg. Z provides:

> If there is more than one creditor in a transaction, *each creditor* shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and purview of his relationship with the customer.
>
> (Emphasis added).

Section 226.8(a) provides:

> All of the disclosures shall be made together on either
>
> (1) the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or
>
> (2) one side of a separate statement which identifies the transaction.

The only reference to FMCC on the face of the contract is one sentence in quite small type just above the place for the *seller's* signature. This sentence states: "The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof." Dee Thomason Ford, on the other hand, is identified at the top of the face of the contract in rather large writing.

FMCC has not been identified clearly within the meaning of Reg. Z. In a situation such as this where the true creditor is a credit company, that entity should be clearly identified so that the debtor knows whom or what he is doing business with. I must assume

that the only reason for placing FMCC's name in small type on the face of the contract in an obscure place is that, hopefully at least, the debtor will fail to read this provision. It is not too much to ask that the true creditor be identified in the same manner the seller is.

V. DESCRIPTION OF SECURITY INTEREST

By virtue of the terms of the purchase contract, FMCC took a security interest in the Pinto automobile when the contract was executed. This security interest was perfected the same date as the sale by notation on the certificate of title. ORS 79.3020(1)(d). The disclosure with regard to this security interest states the following:

> (13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

Section 226.8(b)(5) provides that the required disclosures must include:

> A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify . . . . If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

The defendants' disclosure of their security interests fail to comply with Reg. Z. First, there is no indication that any security interest is held by FMCC.

Secondly, the "description" of the type of security interest held by FMCC and Dee Thomason amounts to little more than a statement that "a security interest under Oregon law" is retained by the seller. (The Uniform Commercial Code is codified at ORS 71.1020, *et seq.*). It should be noted that *Woods* held that the *incorrect* disclosure that the security interest involved covered after-required consumer goods was a violation of Reg. Z. At the least, defendants should have disclosed the *type* of security interest retained under the UCC.[5] Otherwise, a consumer might easily be misled as to his rights in the collateral.

Thirdly, the language "and all other amounts due or to become due hereunder" is, as was the language in *Woods,* surplusage which could be confusing not only to a consumer, but to an attorney as well. Is this meant to be cross-collateral clause,[6] or merely

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[5]This is not to require, as FMCC suggests, that an index of the types and qualities of different security interests possible under the UCC must be disclosed. Something more than the brief statement that "a security interest under the Uniform Commercial Code" is required, however.

[6]For an example of this type of financing arrangement, see *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445 (D.C. Cir. 1965).

It is doubtful that a cross-collateral clause was intended in this transaction where only a single automobile was purchased. The language which describes the security interest does not, however, alleviate the confusion.

a statement that add-ons (such as the insurance premiums in this case) also shall become secured? The generality of the language produces uncertainty.

FMCC would be wise to heed the recent statement of Judge Solomon with regard to language used by insurance companies in their policies:

> Insurance companies could prepare policies in clear, simple and precise language which would inform insureds of the limits of their coverage. Insurance companies could avoid the risk of ambiguity if they use short and precise words and short and simple sentences to express their intent clearly. In spite of continued admonitions of the courts to get rid of such language, insurance companies continue to issue such policies using insurance jargon and verbose and meaningless generalities, all of which result in ambiguities.

Champion International Corp. v. Continental Casualty Co., 400 F. Supp. 978, 981 (S.D.N.Y. 1975).

Again, I must assume that the generality and obscure nature of the language are intended to either confuse the consumer or hide something from him.

VI. DAMAGES

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable as twice the finance charge "in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000." 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

Plaintiffs contend that under the Act, joint borrowers are entitled to recover twice the amount of the damages

specified thereunder. This argument is based on the proposition that both debtors are required to receive the disclosures required by the Act and that each is therefore entitled to damages. This contention fails for two reasons.

First, the language of section 1640 itself is directed at the "transaction" involved, not the parties involved.

Secondly, the congressional intent to limit the recovery in a single credit transaction to $1,000.00 despite the number of borrowers is quite clear. The House Banking and Currency Committee Report, 1968 U.S. Code Cong. & Admin. News at 1976, states the purpose of the civil liability section as follows:

> While the primary enforcement of the bill would be accomplished under the administrative enforcement section . . . further provision is made for the institution of any civil action by an aggrieved debtor. Any creditor failing to disclose required information would be subject to civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty of $1,000 *on any individual credit transaction* . . . (Emphasis added).

The plaintiffs, therefore, are entitled to $1,000.00, costs and attorney's fees.

Dated this 6 day of April, 1976.

/s/ George E. Juba
United States Magistrate

After review of the file and record in this case, I approve the foregoing recommendation.

IT IS ORDERED that defendants' motions for summary judgment are denied.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is granted. Plaintiffs shall recover from the defendants the sum of $1,000.00. At a subsequent hearing attorney's fees shall be determined.

Dated this 6 day of April, 1976.

/s/ Robert C. Belloni
United States District Judge

Order.

In the United States District Court for the District of Oregon.

Dennis Milhollin and Michelle Milhollin, Plaintiffs, v. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation. Defendants. Civil No. 75-334.

Filed and entered: June 25, 1976.

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. §1601, *et seq.*, for alleged violations of the Truth in Lending Act, and Federal Reserve Board Regulation Z (Reg. Z), 12 C.F.R. §226, *et seq.* Jurisdiction is conferred by 15 U.S.C. §1640(e).

The undisputed facts of this case are set out in the attached Recommendation and Order dated April 6, 1976. On that date, I reviewed the record, approved Magistrate Juba's recommendation, denied defendants' Motions for Summary Judgment, granted plaintiffs' Motion for Summary Judgment and ordered that plaintiffs recover judgment against the defendants in the sum of $1,000.

The defendants asked for and received a rehearing. I have studied their additional memoranda and have

heard oral argument on the rehearing. Nothing contained in either, however, convinces me that any change in the original opinion should be made.

A recent case out of the Western District of Pennsylvania deserves some comment, however. *Virginia Jones Main v. Faller Ford, Inc. et al.*, Civil No. 74-337 (W.D.Penn. 1976). In that case, the judge believed that the contract adequately identified FMCC as a creditor. I have not seen the contract in the *Main* case. Its wording seems to be identical to the one in the case at hand. The contract in question has, as its only reference on the face of the contract to FMCC as a creditor, one sentence in small type above the place for the *seller's* signature. Dee Thomason Ford, on the other hand, is identified at the top of the face of the contract in rather large writing. FMCC has not been identified clearly within the meaning of Reg. Z.

Defendants ask this court to make this opinion effective only prospectively from the date of this opinion. They have presented no authority, however, which would give this court the power to reach such a result. That request is denied.

IT IS ORDERED that the defendants' motions to modify and/or vacate are denied.

Dated this 25 day of June, 1976.

Robert C. Belloni
United States District Court

Summary Judgment.

United States District Court for the District of Oregon.

Dennis Milhollin and Michelle Milhollin, Plaintiffs, v. Ford Motor Credit Co., and Dee Thomason Ford, Defendants. Civil No. 75-334.

Filed and entered: June 25, 1976.

Based on the record,

IT IS ORDERED AND ADJUDGED that plaintiffs recover from the defendants the sum of $1,000.00 general damages and the sum of $750.00 attorneys fees.

Dated: June 25, 1976.

Robert M. Christ
Clerk of Court

Opinion

In the United States District Court for the District of Oregon.

Donna M. Eaton, Plaintiff, vs. Ford Motor Credit Company, a corporation, Defendant. Civil No. 76-575.

Richard A. Slottee, Legal Aid Service, 1100 Board of Trade Building, Portland, Or. 97204, Attorneys for Plaintiff.

Herbert H. Anderson, John M. Berman, Dezendorf, Spears, Lubersky & Campbell, 800 Pacific Building, Portland, Or. 97204, Attorneys for Defendant.

Filed: June 16, 1977.

SOLOMON, Judge:

Plaintiff filed an action for $607.84 and for reasonable attorneys' fees against the defendant, Ford Motor Credit Company (Ford), asserting that Ford violated the provisions of the Truth in Lending Act and Federal Reserve Board Regulations.

An action raising many of the same issues was decided by Judge Belloni in *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc.*, Civil No. 75-334 (D.Or., filed April 7, 1976). The Magistrate had found that Ford Motor Credit Co., Inc. was a creditor of the plaintiff, rather than an assignee of the automobile dealer, and that the transaction was governed by the provisions of the Act dealing with creditors. The Magistrate also found that Ford Motor Credit Co., Inc. failed to comply with other provisions of the Act. He therefore denied Ford Motor Credit Co., Inc.'s motion for summary judgment, and he recommended that plaintiff have a judgment against Ford Motor Credit Co., Inc. Judge Belloni reviewed the file and the record, and he granted plaintiff a

judgment in accordance with the recommendations of the Magistrate. Thereafter, Ford Motor Credit Co., Inc., filed a motion to modify or vacate the judgment; and, after a hearing, Judge Belloni denied the motion.

It has been the policy and practice of this Court to respect a fully considered opinion of another Judge of this Court and to follow it unless it appears that an obvious mistake has been made. I have examined the recommendations and order of the Magistrate and the opinion of Judge Belloni in *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc., supra,* and I have also carefully considered the memorandum of law submitted by counsel in this case, and I find that the conclusions reached by Judge Belloni in *Milhollin* are in accord with other federal court decisions in other jurisdictions. They also are in accord with the opinion of Judge Skopil in *Woods v. Beneficial Finance Co. of Eugene,* 395 F.Supp. 9 (D. Or. 1975).

Judge Belloni's holding has been appealed and is now pending in the Ninth Circuit Court of Appeals. Because of all these facts, it would be a waste of judicial time and effort for me to set forth in detail the reasons why I believe the conclusions reached by Judge Belloni should govern this case.

There is no merit in the contention that plaintiff did not purchase the automobile primarily for personal use, nor is there any merit to the other defenses asserted by Ford.

I therefore find that plaintiff is entitled to a judgment against Ford for $607.84 and for reasonable attorneys' fees of $300.00.

Dated this 16th day of June, 1977.

Gus J. Solomon,
United States District Judge

Judgment.

In the United States District Court for the District of Oregon.

Donna M. Eaton, Plaintiff, vs Ford Motor Credit Company, a corporation, Defendant. Civil No. 76-575.

Filed: Aug. 12, 1977.

Based upon the record,

IT IS ADJUDGED AND ORDERED that plaintiff Donna M. Eaton have and recover from defendant Ford Motor Credit Company the sum of $1,300.

DATED this 12th day of August, 1977.

/s/ Gus J. Solomon
Judge, U.S. District Court

Opinion

In the United States District Court for the District of Oregon.

David P. Andresen, Plaintiff, v. Ford Motor Credit Company, a corporation, and Webster-Wolfard Ford, Inc., a corporation, Defendant. Civil No. 76-1090.

John L. Langslet, James C. Waggoner, Martin, Bischoff, Templeton & Biggs, 2908 First National Bank Tower, Portland, Oregon 97201, Attorneys for plaintiff.

Michael J. Esler, Haessler, Stamer & Esler, 2626 First National Tower, Portland, Oregon 97201, Attorney for defendant Webster-Wolfard Ford, Inc.

John M. Berman, Dezendorf, Spears, Lubersky & Campbell, 800 Pacific Building, Portland, Oregon 97204, Attorney for defendant Ford Motor Credit Company.

Filed: July 26, 1977.

LEAVY, J., U. S. Magistrate.

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act (Act), and Federal Reserve Board Regulation Z (Regulation Z), 12 C.F.R. § 226, *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1640(e). Trial was held before the court on July 19, 1977.

On October 5, 1976, plaintiff purchased a 1976 Ford Pinto from defendant Webster-Wolfard Ford, Inc. (Webster). The retail installment contract evidencing this transaction was assigned to and financed by defendant Ford Motor Credit Company (FMCC).

Plaintiff contends that the contract violated the Act and Regulation Z in five particulars:

(1) Failure to make the requisite disclosures clearly, conspicuously, and in meaningful sequence;

(2) Failure to clearly identify FMCC as a creditor on the face of the contract;

(3) Failure to disclose the acceleration clause on the face of the contract;

(4) Disclosure of the $150 payment as both a "pickup" payment and a "ballon" payment, to the confusion of the consumer;

(5) Misstatement of the down payments.

The retail installment contract in the instant case was printed and provided to Webster by FMCC. The evidence discloses that approximately 90 percent of the several hundred retail installment contracts entered into by Webster during the year surrounding the transaction were assigned to FMCC.

On the basis of these facts, I find that FMCC was a creditor in this transaction, and that the contract violated the Act and Regulation Z by failing to clearly disclose this fact on the face of the contract. The court has found similar violations on contracts that are substantially identical to the one involved in the instant case. *Milhollin v. Ford Motor Credit Co.*, Civil No. 75-334 (D. Or. filed April 7, 1976 (on appeal)); *Eaton v. Ford Motor Credit Company*, Civil No. 76-575, (D. Or., filed June 16, 1977). I see no reason to distinguish these cases.

Defendants seek to avoid this result by pointing to additional disclosures made on a separate sheet of paper stapled to the front of the printed retail installment contract. That these additional disclosures

were in fact made is evidenced by plaintiff's signature below them. The regulations, however, are clear. Section 226.8(a) of Regulation Z provides, in relevant part:

> "All of the disclosures shall be made together on either:
>
> (1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or
>
> (2) One side of a separate statement which identifies the transaction."

I find that the disclosures made in the instant case on two pieces of paper stapled together do not meet the requirement of § 226.8(a). Requiring strict adherence to the technical requirements of the Act and Regulation Z may appear harsh in the instant case. Nonetheless, were the court to approve the use of this procedure in this case, the door would be opened to the types of abuses § 226.8(a) was designed to prevent.

As I have found that the contract violates the Act and Regulation Z as described in number (2) above, I need not reach the alleged violations found in (1), (3), (4) and (5) above. *Madison v. United Finance Company, Inc.*, Civil No. 75-1094, (D. Or., filed July 12, 1976, (on appeal)).

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable for a Truth in Lending violation as twice the finance charge, with a liability not less than $100 nor greater than $1000. 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

The finance charge in this transaction was $585.55. Accordingly, plaintiff is entitled to recover the sum of $1000, costs and attorney's fees. Plaintiff shall within five days submit an affidavit as to his attorney's fees. Defendants shall have five days within which to respond.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52.

Dated this 26th day of July, 1977.

/s/ Edward Leavy
United States Magistrate

Judgment.

In the United States District Court for the District of Oregon.

David P. Andresen, Plaintiff, v. Ford Motor Credit Company, a corporation, and Webster-Wolfard Ford, Inc., a corporation, Defendant. Civil No. 76-1090.

Filed: Aug. 16, 1977.

This action came on for trial before the Court, Honorable Edward Leavy, United States Magistrate, presiding, and the issues were tried and a decision rendered.

IT IS ORDERED AND ADJUDGED that plaintiff, David P. Andresen, recover of defendants Ford Motor Credit Company and Webster-Wolfard Ford, Inc. the sum of $1000 as statutory damages, the further sum of $1000 as attorneys' fees, and his costs of action.

Dated at Portland, Oregon, this 16th day of August, 1977.

/s/ Robert M. Christ
Robert M. Christ
Clerk of Court

Opinion.

In the United States District Court for the District of Oregon.

Darrell Messinger, Plaintiff, vs. Ford Motor Credit Co., a corporation, and Marv Tonkin Ford Sales, Inc., a corporation, Defendant. Civil No. 76-475

Mr. Richard Folkes, Attorney at Law, 18448 S. E. Pine Street, Portland, Oregon 97233, Attorney for plaintiff.

Mr. John Berman, Dezendorf, Spears, Lubersky & Campbell, 800 Pacific Building, Portland, Oregon 97204, Attorney for defendants.

Filed: July 26, 1977.

LEAVY, J., United States Magistrate

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act (Act), and Federal Reserve Board Regulation Z (Regulation Z), 12 C.F.R. § 226, *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1640(e). Trial was held before the court on July 19, 1977.

On May 24, 1975, plaintiff purchased a 1975 4-wheel drive pickup truck from defendant Marv Tonkin Ford (Tonkin). The retail installment contract evidencing this transaction was assigned to and financed by defendant Ford Motor Credit Company (FMCC).

Plaintiff contends that the contract violated the Act and Regulation Z in three particulars.[1]

[1]Plaintiff has withdrawn his contention that the contract contained a fourth violation relating to Physical Damage Insurance.

(1) Failure to clearly identify FMCC as a creditor on the face of the contract;

(2) Failure to disclose the acceleration clause on the face of the contract;

(3) Failure to describe or identify the type of security interest retained or acquired by FMCC.

On February 15, 1977, I recommended that plaintiff's motion for summary judgment be denied based on my finding that an issue of fact remained as to whether the pickup truck was purchased for business use, thereby removing the transaction from coverage by the Act. I now resolve that issue in plaintiff's favor. Despite the fact that plaintiff claimed on his income tax return that he used the pickup for business, I find on the basis of plaintiff's testimony that he purchased the truck for personal non-business purposes. The transaction therefore involved the extension of consumer credit as defined by the Act and Regulation Z.

The contract in the instant case was printed and provided to Tonkin by FMCC. The evidence discloses that an estimated 600 to 700 retail installment contracts were entered into by Tonkin during the period commencing six months prior to the transaction and ending six months after the transaction. Of these, all but approximately 100 were assigned to FMCC.

On the basis of these facts, I find that FMCC was a creditor in this transaction, and that the contract violated the Act and Regulation Z by failing to clearly disclose this fact on the face of the contract. This court has found similar violations on contracts that are substantially identical to the one involved in the instant case. *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc.*, Civil No. 75-334 (D.Or., filed April 7, 1976) (on appeal); *Eaton v. Ford Motor Credit Company*, Civil No. 76-575 (D.Or., filed June 16, 1977). I see no reason to distinguish these cases.

As I have found that the contract violates the Act and Regulation Z as described in number (1) above, I need not reach the alleged violations found in (2) and (3) above. *Madison v. United Finance Company, Inc.*, Civil No. 75-1094, (D.Or., filed July 12, 1976) (on appeal).

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable for a Truth in Lending violation as twice the finance charge, with a liability not less than $100 nor greater than $1000. 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

The finance charge in this transaction was $1395.39. Accordingly, plaintiff is entitled to recover the sum of $1000, costs and attorney's fees. Plaintiff shall within five days submit an affidavit as to his attorney's fees. Defendant shall have five days within which to respond.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52.

Dated this 26th day of July, 1977.

/s/ Edward Leavy
United States Magistrate

Judgment.

In the United States District Court for the District of Oregon.

Darrell Messinger, Plaintiff, vs. Ford Motor Credit Co., a corporation, and Marv Tonkin Ford Sales, Inc., a corporation, Defendant. Civil No. 76-475.

Filed: Aug. 16, 1977.

This action came on for trial before the Court, Honorable Edward Leavy, United States Magistrate, presiding, and the issues were tried and a decision rendered.

IT IS ORDERED AND ADJUDGED that plaintiff, Darrell Messinger, recover from defendants Ford Motor Credit Co. and Marv Tonkin Ford Sales, Inc. the sum of $1000 as statutory damages, the further sum of $1000 as attorneys' fees, and his costs of action.

Dated at Portland, Oregon, this 16th day of August, 1977.

/s/ Robert M. Christ
Clerk of Court

Order.

United States District Court, District of Oregon.

Darrell Messinger, Plaintiff, vs. Ford Motor Credit Company, a corporation and Marv Tonkin Ford Sales, Inc., Defendants. Civil 76-475.

Filed: March 15, 1978.

This case was tried before Magistrate Edward Leavy on July 19, 1977 by stipulation of the parties. A decision was entered on July 26, 1977. A Judgment, signed by the Clerk of the Court was entered on August 16, 1977.

It was the intent of the parties that the Magistrate be empowered to direct entry of final judgment in this action. It now appears, however, that notwithstanding this stipulation and intention, an order of a district judge is necessary to direct entry of judgment in a case tried before a magistrate by stipulation.

Accordingly, it is ORDERED that the Clerk enter judgment as follows, *nunc pro tunc* to August 16, 1977:

> "Plaintiff recover from defendants sum of $1,000 statutory damages, + $1,000 attorneys fees, and his costs of action."

Dated: March 15, 1978.

/s/ Otto R. Skopil, Jr.
United States District Judge

APPENDIX C

United States Court of Appeals for the Ninth Circuit.

Chuck St. Germain, Plaintiff-Appellant, v. Bank of Hawaii, Defendant-Appellee. No. 76-2007.

Appeal from the United States District Court for the District of Hawaii.

Decided: December 30, 1977.

Before ELY, HUFSTEDLER and WRIGHT, Circuit Judges.

HUFSTEDLER, Circuit Judge:

The thorny question presented on this appeal is whether the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, *et seq.*, requires disclosure of an acceleration clause in a retail installment contract. The district court held that disclosure was not required (*St. Germain v. Bank of Hawaii* (D.Hawaii 1976) 413 F.Supp. 587), and it granted the Bank of Hawaii's motion for summary judgment. We reverse, holding that TILA compels a creditor making a consumer loan to disclose the creditor's right to accelerate full payment of the debt upon the debtor's default or late payment.

The contract is a standard form "Retail Installment Contract (Automobile)." The face of the contract recites in simple language important rights and duties of the parties. Section four, captioned in large type "DELINQUENCIES AND OTHER CHARGES," states that the debtor will incur a 5 percent delinquency charge, plus a part of the creditor's attorney's fees and/or collector's fees in the event of default or late payment. Section three, captioned "PREPAYMENT PRIVILEGE," states that the debtor is entitled to a refund

of unearned finance charges if he pays the debt before maturity. Nothing is said about the creditor's right to accelerate if the debtor defaults or pays late nor about the possibility of any rebate of unearned finance charges if the debt is accelerated. On the back of the contract in small print, the contract says that, upon default, "the full amount hereof shall at the Seller's option be immediately due and payable and Seller shall have the rights and remedies of the holder of a retail installment contract under Chapter 476, Hawaii Revised Statutes." No reference is made to the rebate of unearned interest upon acceleration.

The question whether TILA requires disclosure of the existence and impact of an acceleration clause in a retail installment contract should have been settled early in TILA's life. Instead, the Federal Reserve Board has issued conflicting signals, and the Circuits are in disarray. The common denominators of the Board's analysis and the basis of the four divergent views of the courts are 15 U.S.C. § 1639(a)(7) (TILA § 129(a)(7)) and 12 C.F.R. § 226.8(b)(4), Regulation Z, implementing TILA. Section 1639(a)(7) provides:

> "(a) Any creditor making a consumer loan . . . shall disclose each of the following items, to the extent applicable:
>
> . . .
>
> (7) The default, delinquency or similar charges payable in the event of late payments."

Section 226.8(b), in pertinent part, states:

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:

. . .

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Judicial responses to the impact of Section 226.8(b)(4) on disclosure of acceleration have split four ways. One response is that disclosure is always required because the right of acceleration is itself a "charge . . . in the event of late payments," within the meaning of TILA and Regulation Z. (*Garza v. Chicago Health Clubs, Inc.* (N.D.Ill. 1972) 347 F.Supp. 955.) After noting that neither TILA nor Regulation Z expressly defines "charge," *Garza* turned to state decisions and to Black's Law Dictionary to find the meaning of "charge." The court decided that "charge" was synonymous with "obligation," "claim," and "expenses," and it concluded:

"Considering these definitions and the purpose of the statute and regulation to inform consumers of credit costs and terms so they can effectively choose between sources of credit . . . it seems clear that the acceleration of the balance of the debt should be considered a 'charge' . . . ." (347 F.Supp. at 959.)

The "always" view enjoyed a spasm of popularity among district courts, at least until two of the better known district court decisions were overturned on appeal. (*Meyers v. Clearview Dodge Sales, Inc.* (E.D.La. 1974) 384 F.Supp. 722, *rev'd* (5th Cir. 1976) 539 F.2d 511, 519; *Johnson v. McCrackin-Sturman Ford, Inc.* (W.D.Pa. 1974) 381 F.Supp. 153, *rev'd* (3d Cir. 1975), 527 F.2d 257.)

Garza has the virtue of providing a uniform national rule which is consistent with the remedial intent of

TILA. (*See Mourning v. Family Publications Service, Inc.* (1973) 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318; *Sellers v. Wollman* (5th Cir. 1975) 510 F.2d 119, 122; *Eby v. Reb Realty, Inc.* (9th Cir. 1974) 495 F.2d 646, 650.) The defect in *Garza* is that equating an acceleration right with the term "charge" is not consistent with the use of "charge" in the context of TILA or in Regulation Z. Thus, Section 1639(a)(7) speaks of "default, delinquency, or similar charges payable," which suggests that "charges" were intended to refer to specific monetary sums rather than an undifferentiated notion of "burden" or "obligation." (*See Johnson v. McCrackin-Sturman Ford, Inc., supra,* 527 F.2d at 266.) Similarly, Regulation Z requires the disclosure of "the amount, or method of computing the amount," of the charges payable in the event of late payment, strongly implying that charges are sums of money, and not the right to payment or to increase the annual percentage rate. Moreover, the Federal Reserve Board's official staff interpretation of TILA and Regulation Z is directly contrary to *Garza.* "[T]he mere right to accelerate contained in a contractual provision . . . is not a *charge* payable in the event of late payment." (Emphasis in original. No. FC-0054 (March 21, 1977) 5 CCH Consumer Credit Guide ¶ 31,552.) Although we are not bound by the Board's official interpretation of Regulation Z nor by a staff opinion letter, both are entitled to respect; we should follow the Board's construction "unless there are compelling indications that it is wrong." (*Moore v. Great Western Savings & Loan Ass'n* (9th Cir. 1975) 513 F.2d 688, 690.) No compelling indications of error are present.

The polar opposite of *Garza* is the view that disclosure is never required. The Fifth and Tenth Circuits have adopted the "never" view. (*Begay v. Ziems Motor Co.* (10th Cir. 1977) 550 F.2d 1244; *Martin v. Commercial Securities Co., Inc.* (5th Cir. 1976) 539 F.2d 521.)[1] These courts reasoned that Congress must not have intended to require disclosure of acceleration clauses because it said nothing expressly about them. Congressional silence about provisions as common as acceleration clauses spoke eloquently to these Circuits to evidence Congress' intent not to include them as disclosure subjects.

Congressional silence is a dubious indicium of legislative intent, especially when we are dealing with a statute like TILA, in which Congress traced very few lines on a new large canvass. Despite the lack of articulate draftsmanship, TILA manifests Congress' overriding interest in disclosure to provide consumer protection. As the Supreme Court observed in *Mourning:*

> "The hearings held by Congress reflect the difficulty of the task it sought to accomplish. Whatever legislation was passed had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future. To accomplish its desired objective, Congress determined to lay the structure of the Act broadly. . . ." (411 U.S. at 365, 93 S.Ct. at 1658.)

[1]The Fifth Circuit may be in transition because rehearing *en banc* has been ordered in *McDaniel v. Fulton National Bank of Atlanta* (5th Cir. 1976), 543 F.2d 568, in which the "never" view was reaffirmed. The *en banc* decision has not yet come down.

For further criticism of the "charge" theory, *see* Comment, *Acceleration Clause Disclosure Under the Truth in Lending Act,* 77 Colum.L.Rev. 649 (1977).

The Court explained that "[t]he Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought 'to . . . avoid the uninformed use of credit.' 15 U.S.C. § 1601." (411 U.S. at 377, 93 S.Ct. at 1664.)

Other courts have adopted the view that disclosure of an acceleration clause is required under some circumstances. The leading proponent of the "sometimes" interpretation is the Third Circuit. The pivot of the intermediate interpretation, as in *Garza,* is the "charge" concept, but the existence of a "charge" depends upon whether the creditor retains or rebates unearned interest after acceleration. The Third Circuit holds that retained interest is a "charge," the existence of which must be disclosed, unless, under state law, the retained interest must be rebated upon acceleration. (*Johnson v. McCrackin-Sturman Ford Inc.* (3d Cir. 1975) 527 F.2d 257.)

A variation of the "sometimes" theme is that disclosure is required if the credit agreement itself fails to provide for rebating unearned interest. That interpretation was initially accepted by a few district courts in the Fifth Circuit, until the Court of Appeals reversed. (*Barrett v. Vernie Jones Ford, Inc.* (N.D.Ga.1975) 395 F.Supp. 904, 908-11, *rev'd* (5th Cir. 1976) 543 F.2d 568; *McDaniel v. Fulton National Bank of Atlanta* (N.D.Ga.1975) 395 F.Supp. 422, 425-28, *rev'd* (5th Cir. 1976) 543 F.2d 568; *see also* Galie, *The Accel-*

eration Clause as a Truth in Lending Disclosure: The End of the Dilemma?, 93 Banking L.J. 317 (1976).)

The "sometimes" interpretation does not run aground upon the textual shoal of *Garza*, nor upon the remedial difficulty with *Begay* and *Martin*. It is not satisfactory, however, because it is too narrow to be genuinely remedial; and it also conflicts with the Federal Reserve Board's interpretation of "charge." (*See* Staff Op'n Letter No. 1208 (July 6, 1977) 5 CCH Consumer Credit Guide ¶ 31,647.) The Third Circuit's addition of the state law element not only complicates the rule, but also builds into the statute and regulation a morass of conflicting and uncertain state law. (*Compare Williams v. Bill Watson Ford, Inc.* (E.D.La.1976) 423 F.Supp. 345, 350-52 (Louisiana law always requires rebate upon acceleration) with *Burley v. Bastrop Loan Co., Inc.* (W.D.La.1976) 407 F.Supp. 773 (Louisiana law provides rebate subject to additional conditions); *compare McDaniel v. Fulton National Bank of Atlanta* (N.D.Ga. 1975) 395 F.Supp. 422 (Georgia law always requires rebate) *with id.* at 424-28 (supplemental opinion) and *Barrett v. Vernie Jones Ford, Inc.* (N.D. Ga.1975) 395 F.Supp. 904 (Georgia law only provides rebates where accelerated payment of finance charges results in a rate of interest in violation of state usury law). *See also Ecenrode v. Household Finance Co. of South Dover* (D.Del.1976) 422 F.Supp. 1327, 1331-32 (Delaware law unclear).) The end product of the Third Circuit's interpretation is the disclosure of rebate confusion.[2] The result cannot be squared with congres-

[2]*E.g., Burley v. Bastrop Loan Co., Inc., supra,* 407 F.Supp. at 781. A state may obligate "the accelerating creditor to rebate the unearned interest . . . [but] this rebate is conditioned upon his filing suit to collect the obligation; the creditor has

sional intent to require creditors to make meaningful disclosures to consumer debtors. (*See Ljepava v. M.L.S.C. Properties, Inc.* (9th Cir. 1975) 511 F.2d 935, 942; *Ecenrode v. Household Finance Co. of South Dover, supra,* 422 F.Supp. at 1331.)

The Federal Reserve Board has not resolved these conflicts; indeed, the Board has injected its own uncertainties. The Board signalled a promising beginning in October, 1974, with a Staff Opinion Letter that suggested a shift from the "charge" analysis to the "prepayment" provisions of 12 C.F.R. § 226.8(b)(7):[3]

> "For the purposes of Truth in Lending disclosures, the staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made apply. If the creditor rebates under one method for acceleration and

the *power*, but not the *right* to collect interest as yet unearned on the obligation." (Emphasis in original.) *See also Galie, supra,* 93 Banking L.J. at 332-33.

[3]12 C.F.R. § 226.8(b)(7) provides:

> "In any transaction subject to this section the following items, as applicable, shall be disclosed:
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> . . .
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act."

In the next paragraph of the letter, however, the staff returned to the "charge" analysis which had occupied the attention of the courts:

"[I]f upon acceleration of the unpaid remainder of the total payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts retained beyond those which would have been rebated under the disclosed rebate provisions represent a 'charge' which should have been disclosed under § 226.8(b)(4)."

(Staff Op'n Letter No. 851 (Oct. 22, 1974), 5 CCH Consumer Credit Guide ¶ 31,173.) A later interpretation repeats the "prepayment" analysis, begun by Letter No. 851, but it does not pursue the implications of the prepayment analysis. (Staff interpretation No. FC-0054, March 21, 1977, 5 CCH Consumer Credit Guide ¶ 31,552 ("[E]arly payment of the balance . . . upon acceleration by the creditor is essentially the same as a prepayment of the obligation.")

We think that the prepayment concept is the correct analytical track. The prepayment concept is not without its own problems, but the difficulties are considerably less than those that have been encountered with the "charge" theories. The prepayment concept leads directly to the conclusion that the effect of the acceleration clause on unearned interest must be "meaningfully disclosed in the disclosure statement," a result which is

consistent both with the overriding purposes of Congress in enacting TILA and with the conclusions that we reached in *La Grone v. Johnson* (9th Cir. 1976), 534 F.2d 1360.[4] The prepayment theory also reaches the *Garza* result without the textual difficulties that *Garza* encounters with the "charge" language. We perceive no serious textual impediment to reading Section 226.8(b)(7) prepayment include involuntary prepayment (acceleration) as well as voluntary prepayment.[5] Like voluntary prepayment, acceleration occurs during the life of the loan, upon the unilateral act of one of the parties, and both forms of prepayment cause payment of the contractual indebtedness before the ultimate time fixed by the agreement. In both voluntary and involuntary prepayment, the question arises whether the debtor is entitled to a rebate of the unearned finance charges. To be sure, voluntary payment is initiated by the debtor and acceleration by the creditor, but the same problem of unearned finance charges arises in either case. The potential impact on the debtor's pocketbook is the same.

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[4]In *La Grone,* we affirmed the district court's decision that the debtor was entitled to rescind a credit transaction because the creditor had failed to disclose an acceleration clause in the disclosure statement. We assumed, without discussion, that disclosure was required. The issue that was litigated was whether disclosure in the underlying note, rather than in the specifically marked disclosure section, satisfied TILA. We held that disclosure in the note did not comply with TILA. *See also Clausen v. Beneficial Finance Co. of Berkeley* (N.D.Cal. 1976), 423 F.Supp. 985, 986, following *La Grone.*

[5]We are aware that the Fifth and Tenth Circuits have criticized the use of the prepayment concept under § 226.8 (b)(7) as also being unsupported by the precise language of the Regulation and the Act. *Begay v. Ziems Motor Co., supra,* 550 F.2d at 1249; *Martin v. Commercial Securities Co., Inc., supra,* 539 F.2d at 529.

We are required to respect the Board's construction of the statute and its own regulation, but less respect is due where, as here, the Board's views have been expressed only through unofficial staff statements rather than official interpretations. Moreover, when the Board has issued conflicting signals, we will choose the direction that makes more sense to us in trying to achieve the congressional purpose of providing meaningful disclosure to the debtor about the costs of his borrowing.[6] As we have pointed out, the charge theory, while superficially plausible, leads to confusion, and, when state law is incorporated in the "charge," the debtor is given an all points bulletin.

When we choose the Board's alternative prepayment theory, we cut a clean path through the thicket. Regulation Z, Section 226.8(b)(7), requires "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full . . . . If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed." When we equate acceleration with prepayment, the disclosure obligation under Section 226.8(b)(7) is evident: The creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated.

[6]The weight accorded the informal letters of the staff of the Federal Reserve Board " 'in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *Evy v. Reb Realty, Inc.* (9th Cir. 1974), 495 F.2d 646, 649-50 n.5, *quoting Skidmore v. Swift & Co.* (1944), 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124.

The Bank of Hawaii did not make the disclosures that we hold are required under Section 226.8(b)(7).[7]

REVERSED.

[7]The failure to disclose the existence of an acceleration clause was only one of several violations of TILA alleged by plaintiff. Since multiple failures to disclose in any single credit sale transaction give rise to only one recovery (15 U.S.C. § 1640(g)) our resolution of the acceleration clause issue obviates the need to consider St. Germain's other claims.

APPENDIX D

Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH ¶31,552.

April 4, 1977

This is in reply to your letter * * * requesting official staff interpretations of the requirements of Regulation Z with regard to computation of finance charge, disclosure of late payment charges, disclosure of loan proceeds, and the meaning of the term "meaningful sequence." This letter is an official staff interpretation of these four matters.

Staff considers the three other questions raised in your letter as inappropriate for official staff interpretations at this time. An official interpretation concerning disclosure of a dealer's reserve is deemed inappropriate because the Board has proposed for comment an amendment and an interpretation of Regulation Z on this same subject. Similarly, an official interpretation concerning whether loan proceeds must be disclosed is deemed inappropriate because this question has been raised in *Pollock v. General Finance Corporation,* a case currently pending in the United States Court of Appeals for the Fifth Circuit in which the Board filed a brief *amicus curiae.* An official interpretation of your question regarding disclosure of notary fees under § 226.8(d)(3) would be inappropriate since staff's position is not one upon which a creditor may wish to rely in a civil action. A response to that issue will, therefore, be provided in a separate unofficial staff letter to you.

To answer your remaining four questions:

(1) You ask whether a creditor's *right* of acceleration upon default by the obligor must be disclosed

as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). It is staff's opinion that the phrase "default, delinquency, or similar charges in the event of late payments," found in § 128(a)(9) and § 129(a)(7) of the Truth in Lending Act and § 226.8(b)(4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge* payable in the event of late payment. Therefore, it need not be disclosed under § 226.8(b)(4).

You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8(b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8 (b)(4).

(2) You ask a further question regarding what charges must be disclosed as default, delinquency, or late payment charges within the context of § 226.8(b)

(4). Specifically, you ask whether attorney's fees and foreclosure costs assessed on a non-automatic basis at the sole discretion of the creditor need to be disclosed pursuant to that section. It is staff's opinion that, if the imposition of these charges is automatic (for example, if the charge becomes immediately due and collectible by virtue of default), the charges must be disclosed under § 226.8(b)(4). If, however, the imposition of the charge is not automatic but is conditioned upon employment of the services of an attorney to effect collection or expenditure of amounts in conjunction with foreclosure proceedings, such charge need not be disclosed under § 226.8(b)(4).

(3) You request an official staff interpretation regarding the requirement in § 226.6(a) that disclosures be made "in meaningful sequence." Specifically, you ask whether any particular arithmetical progression must be used in making the disclosures. You refer to the case of *Allen v. Beneficial Finance Co.*, 531 F. 2d 797 (7th Cir., 1976), which has been interpreted by some to mean that the various disclosure elements must be arranged in a "summation column," as opposed to a subtractional order, to comply with the "meaningful sequence" requirement.

Section 226.6(a) does not set forth any particular arithmetical progression which must be used in making disclosures. It is staff's opinion that the regulation does not require all presentations to be made within the rigid confines of a particular series of additions or subtractions. In fact, it is inappropriate to speak of a "summation" or "subtractional" method as if these were separate and mutually exclusive methods of disclosure. In order to comply with the requirements of

§ 226.8(d), for example, most disclosure statements would necessarily contain both additions and subtractions. A disclosure might begin with a total of payments figure and subtract the amount financed to show the finance charge. The same disclosure would probably involve an addition process in disclosing the amount financed, if it includes other charges, and in disclosing the finance charge, if it contains more than one component. By contrast, a disclosure might begin with the amount of credit paid to or on behalf of the customer (a sum) and require a series of subtractions, if the transaction involves a prepaid finance charge and/or a required deposit balance, to reach the amount financed. The invalidity of attempting to characterize disclosure methods by these labels may be further illustrated by the provisions of § 226.8(c), a series of disclosure items involving a mixture of subtractions and additions which, therefore, cannot be described with a single arithmetical label.

In staff's view, the term "meaningful sequence" cannot and should not be defined by reference to some rigid concept of arithmetical progression. We believe that § 226.6(a) requires related terms to be presented in an order which will assist the customer in understanding their relationship. Given the wide variety in credit transactions, "meaningful sequence" must be determined by reference to the particular set of disclosures under consideration. An arrangement of elements suitable for one type of transaction may not necessarily be adequate for another type of transaction.

(4) You ask whether finders' fees, appraisal fees, credit report fees, and other charges of the type mentioned in § 226.4(a) which are absorbed by the creditor and which are not passed on to the obligor either

directly or indirectly (e.g., by increasing the amount financed or the rate of interest charged) must be itemized and disclosed as components of the finance charge under § 226.8(c)(8)(i) and § 226.8(d)(3). It is staff's opinion that such amounts which are absorbed by the creditor as a cost of doing business and are not directly or indirectly imposed upon the obligor do not constitute finance charges within the general definition of § 226.4(a). Since they are not part of the finance charge, they need not be itemized and disclosed under § 226.8(c) or § 226.8(d).

This letter is an official staff interpretation of Regulation Z, issued in accordance with § 226.1(d)(3) of the regulation, and limited in its application to the facts and issues presented herein. I trust it will be of assistance to you.

Jerauld C. Kluckman
Associate Director

APPENDIX E

Public Information Letter No. 851 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,173
October 22, 1974

This is in response to your letter of June 26, inquiring whether an acceleration clause in an instalment contract is a "charge" payable in the event of late payment within the meaning of § 226.8(b)(4) of Regulation Z and therefore must be disclosed with other required items.

For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act.

If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8(b)(7), we believe that there is no *additional* "charge" for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8(b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts

retained beyond those which would have been rebated under the disclosed rebate provisions represent a "charge" which should be disclosed under § 226.8(b)(4).

Frederic Solomon,
Director

APPENDIX F

Public Information Letter No. 1208 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,647

July 6, 1977

This is in reply to your letter * * * requesting clarification of Official Staff Interpretation FC-0054, which discussed the right of acceleration.

In FC-0054, staff took the position that a creditor's right of acceleration upon default by the obligor need not be disclosed as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). The interpretation went on to state, however, that since early payment of the balance of an obligation upon acceleration is essentially the same as voluntary prepayment, if the creditor does not rebate unearned finance charges in the former situation in accordance with the rebate provisions disclosed under § 226.8(b)(7), any extra amounts retained represent the type of charge that must be disclosed under § 226.8(b)(4).

You state that frequently a disclosure statement will include a provision concerning rebate of unearned finance charges upon prepayment, but contains no reference to the right of acceleration in the event of default. The promissory note to which the statement relates, however, often does contain an acceleration clause stating that "the entire then remaining unpaid balance hereof shall . . . be immediately due and payable . . .," making no reference to any rebate in the event of payment after acceleration. You state that some creditors have a policy of providing rebates upon early payment after acceleration, while others do not. You suggest that where the contract is silent concerning rebate upon prepayment after acceleration, it must be

assumed that such a rebate is *not* provided, and, therefore, the disclosure statement must make the § 226.8 (b)(4) disclosure discussed above.

Staff does not agree with your analysis of this situation. The fact that the contract is silent concerning rebate upon prepayment after acceleration is not determinative of the issue; the question is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation.

This is an unofficial staff interpretation of Regulation Z. Although you requested issuance of an official staff interpretation, we believe that to be inappropriate in these circumstances since your question does not appear to staff to involve a technical ambiguity in the regulation.

Jerauld C. Kluckman
Associate Director

APPENDIX G

Public Information Letter No. 1324
Cons. Cred. Guide (CCH) ¶31,827
November 14, 1978

This is in response to your letter * * * in which you request an interpretation of § 226.8(b)(4) of Regulation Z, which requires disclosure of the amount or method of computing the amount of any default, delinquency, or similar charges which may be imposed in connection with a credit transaction.

Specifically, you ask whether a disclosure is required under § 226.8(b)(4) where a credit agreement gives the creditor the right, upon the customer's default, to accelerate payment of the entire indebtedness, including unearned finance charges, but State law requires a rebate of unearned finance charges in such circumstances.

Your question is answered in part by reference to Official Staff Interpretation FC-0054 and Public Information Letter 1208, copies of which are enclosed. The staff's position, as expressed in those interpretations, is that if a creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly disclosed in accordance with § 226.8(b)(7), there is no default charge. However, any amounts retained by a creditor upon acceleration which would have been rebated under the disclosed rebate provisions would represent the type of default charge which must be disclosed pursuant to § 226.8(b)(4).

Applying the foregoing to the situation you pose, the staff believes that if a creditor in fact rebates

unearned finance charges in connection with prepayment upon acceleration in accordance wtih State law and, as a result, the customer receives the same rebate as would be received under the disclosed rebate mthod, then prepayment upon acceleration would not involve any default charge.

Conversely, any unearned finance charges retained by a creditor in connection with prepayment upon acceleration, which would not be retained under the disclosed rebate calculation method, would constitute a default charge which must be disclosed under § 226.8(b)(4). This is so whether the excess charges are retained pursuant to the creditor's apparent contract right or because the rebate method prescribed by State law results in a lesser rebate than the method disclosed.

There is an additional consideration which the staff would also call to your attention. Even where a creditor's policy is to rebate unearned finance charges in the event of prepayment upon acceleration in accordance with State law, so that no charges are retained in excess of those indicated by the disclosed rebate method, a statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by § 226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of § 226.6(c) of Regulation Z. If this additional information is misleading or confusing or contradicts, obscures, or detracts attention from the required § 226.8(b)(7)

disclosure, there would be a violation of the regulation. Of course, the capacity of the additional information to mislead or confuse can only be determined by reference to all of the circumstances of a particular case.

You note that the question of disclosure of the right of acceleration has been the subject of litigation in various jurisdictions. The views expressed in this letter and the enclosed interpretations represent the staff's opinion on this issue. However, it would be advisable for creditors to be aware of court holdings in their particular jurisdiction (some of which may be contrary to the staff's position) so that they may determine the most prudent course to follow. The particular case which you cite, ***McDaniel v. Fulton National Bank of Atlanta,*** 571 F. 2d 948 (5th Cir. 1978), however, would appear to be consistent with the staff's views. In fact, the court in that case relied in part upon FC-0054 in reaching its decison.

This is an unofficial staff interpretation of Regulation Z, limited in its applicability to the facts and issues discussed above. If you desire further assistance, please contact this office or Mr. Richard A. Dill, Assistant Vice President, Department of Supervision and Regulation, Federal Reserve Bank of Atlanta, Atlanta, Georgia 30303.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of March, A.D. 1979.

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